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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CBS INC.,

Petitioner,

vs.

MARTIN W. BERDA and LINDA BERDA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DOUGLAS P. JACOBS*
HELEN M. GOLD
ANTHONY M. BONGIORNO
CBS INC.
51 West 52nd Street
New York, NY 10019
(212) 975-3031

Attorneys for Petitioner CBS Inc.

* *Counsel of Record*

Of Counsel:

ARTHUR J. SCHWAB
MARK A. FONTANA
REED SMITH SHAW & MCCLAY
435 Sixth Avenue
Pittsburgh, PA 15219
(412) 288-3112

QUESTIONS PRESENTED FOR REVIEW

1. Whether courts should be creating new substantive rights which conflict with the legislative framework for the ordering of relations between employees and employers under the Labor Management Relations Act, so as to permit a bargaining-unit employee to proceed with state-law contract and fraud claims predicated on pre-employment individual promises that conflict with the terms of a collective bargaining agreement — a question on which the Circuits have split?

2. Whether a rule allowing state-law claims to proceed on these facts will invite bargaining-unit members to abandon the arbitral forum, which forum best serves the mandate for the development and application of uniform federal law to labor/management disputes?

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VS.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 881 F.2d 20 (3d Cir. 1989) and 131 L.R.R.M. 3073 (3d Cir. 1989), and is reproduced at Appendix pp. A-1-20. The opinion of the United States District Court for the Western District of Pennsylvania is unreported, and is reproduced at Appendix pp. A-22-25.

JURISDICTION

The Judgment of the United States District Court for the Third Circuit was entered on July 20, 1989. (A-21) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 173(d):

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

29 U.S.C § 185(a):

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

This petition seeks review of a decision that represents an assault on the legislative framework for the ordering of relations between employers and employees under the Labor Management Relations Act ("LMRA"). Petitioner CBS Inc. ("CBS")[1] asks

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[1] CBS has no corporate parent or affiliates, and has no corporate subsidiaries other than wholly-owned subsidiaries. All parties to the proceeding below are named in the caption.

this Court to review a Judgment of the United States Court of Appeals for the Third Circuit which allows respondents Martin W. Berda, and his wife, Linda Berda,[2] to proceed with state-law contract and fraud claims arising from a company-wide lay-off, notwithstanding the fact that Berda concedes that his lay-off was in accordance with the terms of a collective bargaining agreement (the "Collective Bargaining Agreement") between CBS and the International Brotherhood of Electrical Workers ("IBEW").

To avoid the strictures of the Collective Bargaining Agreement, Berda argued below that his lay-off violated pre-employment individual promises of job security by CBS. By these individual promises, despite the conflicting terms of of the Collective Bargaining Agreement, and unlike all other CBS bargaining-unit members, Berda argues that he alone was completely insulated from any decision by CBS to reduce its workforce, or effect any other type of lay-off contemplated by the Collective Bargaining Agreement. By the Judgment involved here, the court below concluded that the terms and conditions of Berda's employment were controlled by the alleged individual promises, and held that the pre-emptive reach of § 301 of the LMRA does not extend to the pre-employment individual promises alleged by Berda.

A. *Facts*

Prior to his hire by CBS, Berda was employed by television station WPXI in Pittsburgh, Pennsylvania in a bargaining-unit position, and served as shop steward for the local union. (A-3)

On April 14, 1986, petitioner CBS hired respondent Berda as a technician with CBS Operations and Engineering in Washington, D.C. (A-3-4) It is undisputed that this was a bargaining-unit position governed by the Collective Bargaining Agreement between CBS and the IBEW. (A-4)

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[2] As respondent Linda Berda's only claim against CBS, for loss of consortium, is purely derivative, references herein to "Berda" will refer to respondent Martin W. Berda. Respondent Linda Berda's claim is not separately addressed.

Section 1.01 of the Collective Bargaining Agreement provides that "[a]ny changes, supplements or amendments" to the Agreement must be signed by the parties. (A-27)

Section 5.03 of the Collective Bargaining Agreement provides, in pertinent part, that:

> [l]ayoffs caused by a reduction of staff shall be made in the inverse order of seniority within each of the separate units as defined in Section 5.02 . . . [which governs the seniority of all bargaining-unit employees].

(A-31)[3]

On August 29, 1986, Berda was laid off by CBS as part of a company-wide reduction in the work-force. (A-4) Berda does not dispute that his lay-off was in accordance with the terms of the Collective Bargaining Agreement.

To avoid the effect of the Collective Bargaining Agreement, Berda contends that his lay-off violated pre-employment individual promises of job security by CBS. On or about February 27, 1986, CBS allegedly induced him to accept employment by promises that he would not face any lay-offs and that he would be employed "for the reasonably foreseeable future. . . ." (A-3) In Berda's view, these promises completely insulated him from any decision by CBS to reduce its work-force, or effect any other type of lay-off contemplated by the Collective Bargaining Agreement.

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[3] Section 1.02 recognizes the Union as the sole and exclusive bargaining agent for all technicians and provides that the Collective Bargaining Agreement controls the terms and conditions of employment of technicians. (A-27)

Sections 2.01-.05 implement mandatory grievance and arbitration procedures for the "equitable and efficient settlement of disputes and controversies on specific questions arising under this Agreement . . . ." (A-28-29)

B. *Procedural history*

On January 19, 1988, respondents filed this action against petitioner CBS in the Court of Common Pleas of Allegheny County, raising state-law claims under Pennsylania law for breach of contract/promissory estoppel, fraudulent misrepresentation and loss of consortium. (A-2, 4-5)

On February 25, 1988, CBS timely removed this case to the United States District Court for the Western District of Pennsylvania on the basis of federal question and diversity jurisdiction. (A-4-5)[4]

On February 25, 1988, CBS filed an Answer, denying liability and raising, *inter alia*, the defense of pre-emption under federal law. On March 17, 1988, CBS filed a motion for judgment on the pleadings or, alternatively, for summary judgment. (A-5) On April 5, 1988, respondents filed their opposition papers.[5]

By Memorandum Opinion and Order dated June 15, 1988, the District Court concluded that respondents' claims were preempted by Section 301 of the LMRA, 29 U.S.C. § 185(a), as resolution of those claims would "ultimately depend upon the interpretation of a provision in the collective bargaining agreement . . . ." (A-25) In the District Court's view, as the individual promises were "inconsistent with Section 5.03 . . . and would limit or condition its terms," they were, therefore, subsumed into the Collective Bargaining Agreement and could be stated only as a § 301 claim. (A-25)[6] Accordingly, as this claim had not been filed within the six-month limitations period set forth in Section 10(b) of the National Labor Relations Act ("NLRA"), 29

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[4] CBS is a New York corporation with its principal place of business in New York. Respondents are citizens of the Commonwealth of Pennsylvania.

[5] In light of the procedural posture of this case, the allegations of the Complaint are not in dispute.

[6] In reaching this conclusion, the District Court relied upon *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944). (A-24)

U.S.C. § 160(b), which controls Section 301 claims,[7] the District Court granted CBS' motion and dismissed the Complaint. (A-25)

By Judgment dated July 20, 1989, the Third Circuit reversed, concluding that Berda's claims were not pre-empted by § 301, as they arose from individual promises that were made before he joined the bargaining-unit and, accordingly, could be resolved "without asking the court to analyze the collective bargaining agreement. . . ." (A-3) As the Third Circuit acknowledged, this case raises

> the circuit-splitting question whether state contract and tort claims for monetary relief brought by a bargaining unit employee against his employer based upon alleged misrepresentations of job security, made before the employee became a member of the bargaining unit, thereby conferring additional rights to those afforded by the collective bargaining agreement, are preempted by section 301 . . . .

(A-2)

In direct conflict with the Ninth Circuit's holding in *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993 (9th Cir. 1987), the Third Circuit reasoned that this Court's decision in *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987) (hereinafter "Caterpillar") controls this issue, even though that case is factually and legally distinguishable. (A-13) *Caterpillar* involved issues of removal jurisdiction and promises of job security to managerial employees relating to the terms and conditions of their employment as managerial employees. *Caterpillar*, as the Ninth Circuit

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[7] Respondents conceded in the Third Circuit that if their state-law claims are pre-empted by Section 301, the District Court properly dismissed these claims as time-barred by the six-month limitations period for Section 301 actions. *See DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 169-72 (1983). It also follows that the respondents' claims would be barred because of their failure to exhaust the grievance and arbitration procedures mandated by Sections 2.01-.05 of the Collective Bargaining Agreement. *See Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-57 (1965).

has concluded, simply does not involve individual promises about a bargaining-unit position.

In *Caterpillar*, several managerial employees were allegedly promised that they could look forward to "indefinite and lasting employment" with the corporation. *Id.* at 388-89. After they were later downgraded to bargaining-unit positions[5] and subsequently fired, they filed suit in state court, alleging, *inter alia*, breach of these individual promises of job security. *Id.* at 389-90. *Caterpillar* removed the action to federal court on the basis of § 301, and the Ninth Circuit, reversing the district court, concluded that the claim did not "arise under" § 301, and was, therefore, not pre-empted. *Id.* at 390-91.

This Court affirmed, concluding that simply because an employer may raise as a defense to a state-law contract claim a "federal question, even a § 301 question", does not mean that the claim is pre-empted by § 301. *Id.* at 398. Applying the pre-emption test of *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) this Court noted that § 301 pre-emption results only when resolution of a claim raised "on the face of the . . . complaint" will "substantially [depend upon an] analysis of [the] collective-bargaining agreement." *Caterpillar*, 482 U.S. at 392-97 (quoting *Electrical Workers v. Hechler*, 481 U.S. 851, 859 n.3 (1987)). If "[t]he heart of the [state-law] complaint [is] a . . . clause in the collective bargaining agreement," the Court agreed, the case would be removable. *Id.* at 394 (quoting *Avco Corp. v. Aero Lodge No. 735, International Association of Machinists and Aerospace Workers*, 390 U.S. 557, 558, *reh'g denied*, 391 U.S. 929 (1968)).

On the facts before it, this Court concluded in *Caterpillar* that the action was improperly removed, as the claims were premised on individual employment contracts "independent" of the bargaining agreement. *Caterpillar*, 482 U.S. at 395-97. Accordingly, this Court implicitly upheld plaintiffs' right to raise

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[5] They were allegedly assured at the time that these downgrades were temporary. *Id.* at 389.

state-law claims for breach of these individual promises, concluding that those claims were not "substantially dependent" upon interpretation of the collective-bargaining agreement, as "[plaintiffs] rely on contractual agreements *made while they were in managerial or weekly salaried positions – agreements in which the collective-bargaining agreement played no part.*" *Id.* at 395 & n.9 (emphasis added).

Relying upon *Caterpillar*, the Third Circuit reasoned that "not all pre-employment contracts are subsumed by [a subsequent] collective bargaining agreement," and concluded that § 301 does not preempt state-law contract claims premised on pre-employment individual agreements that confer rights beyond those afforded by a collective bargaining agreement, even though inconsistent with its terms. (A-14-15) Applying the *Lueck* test, the Court of Appeals, therefore, concluded that resolution of Berda's state-law contract claim is not "substantially dependent" upon an analysis of his Collective Bargaining Agreement, as his claim is premised on contract rights which are "independent" of the Collective Bargaining Agreement, and which survive its terms. The court similarly concluded that Berda's tort claim was not pre-empted, as he "was not required to refer to the collective bargaining agreement in order to state his tort claim", but "need only plead and establish that [CBS] promised him that he would not be laid off for a reasonable period of time [knowing] . . . that . . . CBS was planning a reduction in force that would affect him" and show reliance on that promise. (A-17) In its view, the fact

> that the misrepresentations concerned layoffs and that there was a provision of the collective bargaining agreement that also related to layoffs *are facts of no consequence*, because Berda need not refer to the provision . . . in order to make out his claim."

(A-18) (emphasis added).

For these reasons, the Third Circuit reversed the dismissal of the Complaint and allowed respondents' claims to proceed.[9]

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[9] The Third Circuit did not reach CBS' other arguments that Berda's state-law claims were precluded because they arguably presented unfair labor practices

(Footnote continued)

On August 3, 1989, the Third Circuit stayed the issuance of its mandate, pending the filing of this petition.

REASONS FOR GRANTING THIS PETITION

This petition presents the Court with an opportunity to clarify the pre-emptive ambit of § 301 and thereby resolve the conflict in the Circuits over whether state-law claims arising from pre-employment promises about a bargaining-unit position are pre-empted by § 301.

Berda's thesis is that (1) the alleged pre-existing individual contract, made at a time when he was a shop steward at station WPXI and about a prospective bargaining-unit position at CBS, survived the Collective Bargaining Agreement and became a co-existing contract during the relevant time period — throughout his bargaining-unit employment and when the allegedly wrongful discharge occurred; and (2) that this individual contract controlled the terms and conditions of his bargaining-unit employment on matters of conflict. Accordingly, by these alleged promises, despite the conflicting terms of an admittedly applicable Collective Bargaining Agreement, and unlike all other CBS bargaining-unit members, Berda claims a position of privilege which would be prohibited by the Collective Bargaining Agreement, and which allegedly completely insulated him from any decision by CBS to reduce its work-force, or effect any other type of layoff contemplated by the Collective Bargaining Agreement. By allowing Berda to pursue these claims, the Third Circuit allows highly questionable state-law theories to invade federally regulated conduct.

This decision, reflecting, as it does, the tension between individual rights and remedies under state-law and obligations

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within the exclusive jurisdiction of the National Labor Relations Board (*see San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)), or because the individual contract conflicted with the principle of exclusive representation in § 9(a) of the National Labor Relations Act. *See Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 146 (1976). CBS raised both of these arguments before the District Court, and urged them again on appeal, but the Third Circuit declined to address them. (A-19-20)

under collective bargaining agreements, the breach of which might constitute a violation of federal labor law, simply strays too far from this Court's, and, indeed, Congress', efforts to establish a uniform federal labor law in matters relating to the interpretation of collective bargaining agreements.

The Third Circuit decision also sharpens the conflict in the Circuits over the pre-emptive ambit of § 301 and actually invites bargaining unit members to abandon the arbitral forum, which forum best serves the mandate for the application of uniform federal labor law. As a result, state courts may now entertain a host of lawsuits brought by bargaining unit members seeking to circumvent the strictures of their collective bargaining agreements. More ominously, if the Third Circuit rule prevails, employers may refuse to agree to grievance/arbitration provisions in collective bargaining agreements, so as to create a level playing field, knowing that an employee can easily circumvent any such provision by alleging the existence of an "independent" pre-employment agreement.

For these reasons, this Court should grant this petition, resolve the conflict in the Circuits, and end this potential assault on the collective bargaining process.

I.

THERE IS A SHARP SPLIT IN THE CIRCUITS OVER WHETHER THE PRE-EMPTIVE REACH OF § 301 EXTENDS TO PRE-EMPLOYMENT PROMISES ABOUT THE TERMS AND CONDITIONS OF EMPLOYMENT IN A BARGAINING-UNIT POSITION

A. *Introduction*

Section 301 of the LMRA, 29 U.S.C. § 185(a), confers federal jurisdiction over

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . .

This statute is both a jurisdictional grant and a mandate for the development and application of federal substantive law. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957). Section 301 represents a Congressional mandate for the courts to fashion a uniform body of federal common law for the resolution of disputes arising under collective bargaining agreements, "according to the precepts of federal labor policy." *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962).[10] This body of federal common law is "uniformly to prevail over inconsistent local rules." *Id.* at 104.

This Court has recognized that the "ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace." *Id.* State-law which frustrates the effort of Congress to stimulate the smooth functioning of that process "strikes at [its] very core . . . ." *Id.*

For these reasons, when state-law is invoked to regulate activities which are the subject of a collective bargaining agreement, national labor policy requires that state law yield. Section 301, therefore, pre-empts state-law claims directly based on rights created by a collective bargaining agreement, as well as claims that are "substantially dependent on analysis of a collective-bargaining agreement." *Caterpillar*, 482 U.S. at 394. The judicially-created test for § 301 pre-emption provides that:

> when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, *that claim must either be treated as a* § 301 claim

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[10] This Court analyzed the pre-emptive effect of § 301 in *Lucas Flour*, which involved an issue of contract interpretation: whether a collective bargaining agreement implicitly prohibited a strike called by the union. The Washington Supreme Court resolved this issue by applying state-law rules of construction. This Court rejected that approach, and concluded that the claim must be brought under § 301 and resolved by reference to federal law, in order to ensure uniform interpretation of collective bargaining agreements and, thus, to promote the consistent resolution of labor/management disputes. *Lucas Flour*, 369 U.S. at 102-106.

. . . or dismissed as pre-empted by federal labor-contract law.

Lueck, 471 U.S. at 220 (emphasis added); *see also Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988) (state law claim pre-empted if it "requires the interpretation of a collective bargaining agreement").[11]

As seen below, there is a sharp split in the Circuits over whether the pre-emptive reach of § 301 extends to pre-employment promises that conflict with the terms of a collective bargaining agreement.

B. *The Third Circuit Correctly Recognized That This Case Raises A "Circuit-Splitting" Issue*

The Third Circuit correctly recognized that the Circuits have split on the issue of whether the pre-emptive reach of § 301 extends to state-law claims arising from pre-employment promises. Four other Circuits have now faced, and divided on, the issue of whether pre-employment promises concerning the terms and conditions of employment in a bargaining-unit position implicate § 301. *Compare Young v. Anthony's Fish Grottos, Inc.*,

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[11] A logical corollary to the broad pre-emptive reach of § 301 is the rule precluding bargaining-unit members from negotiating individual contracts that are inconsistent with the terms of a collective bargaining agreement. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944); *see also NLRB v. Allis-Chalmers Manufacturing Co.*, 388 U.S. 175, 180, *reh'g denied*, 389 U.S. 892 (1967) (national labor policy "extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees.")

For this reason, individual contracts, "no matter what the circumstances that justify their execution or what their terms, *may not be . . . used to . . . limit or condition the terms of the collective agreement . . .* [or] . . . subtract from collective ones. . . ." *J.I. Case*, 321 U.S. at 337-39 (emphasis added).

Although *J.I. Case*, admittedly, did not involve § 301 pre-emption principles, as discussed below, the District Court here, and the Fifth Circuit, have applied the *J.I. Case* principles to § 301 claims.

830 F.2d 993 (9th Cir. 1987) (post-*Caterpillar*) and *Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d 359 (5th Cir.) (pre-*Caterpillar*), *cert. denied*, 469 U.S. 1018 (1984) *with Varnum v. Nu-Car Carriers, Inc.*, 804 F.2d 638, 640 (11th Cir. 1986) (pre-*Caterpillar*), *cert. denied*, 481 U.S. 1049 (1987) and *Anderson v. Ford Motor Co.*, 803 F.2d 953, 955-59 (8th Cir. 1986) (pre-*Caterpillar*), *cert. denied*, 483 U.S. 1011 (1987).

Under the Ninth Circuit view, for example, the court will focus on the nature of the job involved. If the pre-employment promise involves the terms and conditions of employment in a *bargaining-unit position*, any state-law claims arising from those promises will be pre-empted by § 301. In *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993 (9th Cir. 1987), plaintiff was allegedly promised at the time of hire that she could be discharged only for just cause. *Id.* at 996. Her position, however, was governed by a collective bargaining agreement, which provided that during an employee's 30-day probationary period, the employee could be discharged at will. Plaintiff was fired after one day on the job, and brought suit asserting state-law claims for, *inter alia*, breach of this individual promise and misrepresentation. *Id.*

The Ninth Circuit, reaffirming its holding in *Bale v. General Telephone Co.*, 795 F.2d 775, 779-80 (9th Cir. 1986)[12] rejected Young's argument that her "individual" contract was

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[12] In *Bale*, decided pre-*Caterpillar*, plaintiffs contended that they were told at the time of hire that after six months they would no longer be considered "temporary" employees as defined by the collective bargaining agreement, but rather would be accorded regular employee status. Subsequently, however, when several regular employees returned from leaves of absence, plaintiffs were discharged. *Bale*, 795 F.2d at 777.

The Ninth Circuit held that plaintiffs' state-law tort claims were not "sufficiently removed from the collective bargaining agreement to fall outside the preemptive ambit of section 301," reasoning that adjudication of plaintiffs' tort claims "would require reference to, and interpretation of, the terms of the collective bargaining agreement." *Id.* at 779-80.

independent of the collective bargaining agreement,[13] reasoning as follows:

> The subject matter of her contract, however, is a job position covered by the [collective bargaining agreement]. Because any "independent agreement of employment [concerning that job position] could be effective only as part of the collective bargaining agreement," the [collective bargaining agreement] controls and the contract claim is preempted.[14]

Young, 830 F.2d at 997-98.

In so holding, the Ninth Circuit distinguished this Court's decision in *Caterpillar*, concluding that that decision merely holds that "a breach of contract claim *concerning a job not governed by a collective agreement* could be effective independent of the agreement and is therefore not completely pre-empted." *Id.* (emphasis added)[15]

Prior to *Caterpillar*, the Fifth Circuit similarly held that § 301 pre-empts pre-employment individual promises about a

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[13] The Ninth Circuit explicitly rejected the contrary holding of the Eighth Circuit in *Anderson v. Ford Motor Co.*, 803 F.2d 953 (8th Cir. 1986), discussed *infra* at pp. 16-17. *Young*, 830 F.2d at 997 n. 1.

[14] The *Young* court also concluded that the tort claims were pre-empted as well, as they were inextricably intertwined with the terms of the Collective Bargaining Agreement. *Id.* at 999-1002.

[15] This view is shared by the commentators, who have uniformly concluded that *Caterpillar* does not apply to pre-employment individual promises about a bargaining-unit position. *See, e.g.*, Yonover, *Preemption of State Tort Remedies for Wrongfull Discharge in the Aftermath of Lingle v. Norge: Wholly Independent or Inextricably Intertwined?*, 34 S.D.L. Rev. 63, 88 n. 22 (1989)(noting split in Circuits on issue of § 301 pre-emption of state-law claims based on "fraudulent misrepresentation allegedly made before there was a collective bargaining agreement" and observing that *Caterpillar* "did not directly resolve this split") (citing *State Labor Law Developments*, 4 The Lab. Law. 349, 355-56 (1988) (Committee Reports Issue)); *see also* 18A *Business Organizations*, Kheel, Labor Law (MB) § 9.05[6](August 1989).

bargaining-unit position. In *Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d 359, 360 (5th Cir. 1984), a former employee brought suit for breach of an alleged pre-employment individual promise that he would "receive full compensation [for work-related injuries] during any period of total or partial disability, or until retirement." After a period of disability, plaintiff was discharged because of his inability to work, in accordance with the provisions of his collective bargaining agreement, and subsequently sued on this individual promise.

The Fifth Circuit determined that the alleged "independent" contract was tantamount to a contract for lifetime employment. Applying federal substantive law, the Fifth Circuit concluded that Eitmann's claim was subsumed into and pre-empted by the collective bargaining agreement, as it attempted to "limit or condition" the terms and conditions of his employment set forth in the collective bargaining agreement, including the discharge provisions. *Id.* at 362-63, relying upon *J.I. Case*.

In reaching this conclusion, the Fifth Circuit deemed inapposite this Court's holding in *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), where this Court recognized the right of strike replacements, who were discharged when strikers returned, to bring a state-law breach of contract action based on promises of permanent employment. *Belknap* was not persuasive, the Fifth Circuit reasoned, because the *Belknap* plaintiffs were not covered by a collective bargaining agreement and "sought relief that [§ 301] did not afford them." *Eitmann*, 730 F.2d at 364. The claims were, therefore, "of only peripheral concern" to federal labor law. *Belknap*, 463 U.S. at 498. For these reasons, the Fifth Circuit held Eitmann's claims pre-empted, noting that "[t]o hold otherwise . . . would frustrate the policy of the federal labor laws." *Eitmann*, 730 F.2d at 364.

Other Circuits to face the issue have reached the opposite conclusion, focusing solely on the timing of the alleged representations. In their view, if representations are made to an individual before he joins a bargaining-unit, § 301 will not be implicated at all, even if those representations concern the terms and

conditions of his employment in a bargaining-unit position. For example, in *Varnum v. Nu-Car Carriers, Inc.*, 804 F.2d 638 (11th Cir. 1986), plaintiff was allegedly induced to accept employment by misrepresentations that work was allocated on a "first-in-first-out" basis, which would provide equal work opportunities to truckers, regardless of seniority. Shortly after plaintiff's employment began, his employer implemented a seniority-based dispatch system, in accordance with a collective bargaining agreement. *Id.* at 639.

The Eleventh Circuit allowed the state-law fraud claim to proceed, reasoning that the claim "did not go to a term of employment covered by the collective bargaining agreement." As "the complaint focused on conduct that occurred prior to the plaintiff's accepting employment, the case is . . . not pre-empted by Section 301." *Id.* at 640.[16] In so holding, the Eleventh Circuit deemed *Belknap* persuasive, despite the differences in the plaintiff's statuses, *i.e.*, Varnum became a bargaining-unit member subject to the terms of a collective bargaining agreement.

To the same effect is the rule in the Eighth Circuit. In *Anderson v. Ford Motor Co.*, 803 F.2d 953, 954-55 (8th Cir. 1986), plaintiffs had been laid off, then re-hired, only to be "bumped" from jobs by employees on a preferential hiring list, in accordance with a collective bargaining agreement. Plaintiffs were considered "new hires" because their "recall rights" under the collective bargaining agreement had expired.

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[16] The court distinguished the contrary holding of *Eitmann*, which is discussed above at page 15, mistakenly concluding that *Eitmann* did not involve pre-employment promises. *Varnum*, 804 F.2d at 640.

A different panel of the Eleventh Circuit, however, has held that state-law claims premised on representations of job security to one already an "employee" under a collective bargaining agreement will be pre-empted, distinguishing *Caterpillar* on this basis. *Darden v. United States Steel Corp.*, 830 F.2d 1116, 1118-20 (11th Cir. 1987) (state-law claims pre-empted where premised on "independent" promises of job security to employee on "layoff status," who was later allegedly induced to take job by representations that employer had enough work to guarantee him employment for ten years).

A divided panel of the Eighth Circuit, observing that the claims before it "closely resemble those considered in *Belknap*", concluded that the state-law contract claims were not pre-empted, as they were premised on promises that were made "before . . . they were even covered by the collective bargaining agreement." *Id.* at 958.[17] The court similarly concluded that resolution of the fraud claim would not substantially depend upon any analysis of the agreement: "proof of fraud does not depend on the existence of any contractual relationship, nor do the standards for judging fraudulent misconduct derive from any contractually-established expectations of the parties." *Id.* at 957.

Accordingly, there is a sharp split in the Circuits over whether pre-employment individual promises about a bargaining-unit position implicate § 301. The Ninth and Third Circuits now also diverge on whether this Court's decision in *Caterpillar* controls this issue. The confusion in the Circuits over the proper scope of this Court's § 301 pre-emption teachings is also underscored by the fact that this Court's earlier decision in *Belknap*, deemed inapposite by the Fifth Circuit in *Eitmann*, was deemed controlling by the Eleventh Circuit in *Varnum* and the Eighth Circuit in *Anderson*, even though those courts were all faced with cases involving pre-employment promises about the terms and conditions of employment in a bargaining-unit position.

For these reasons, this Court should grant this petition and guide the Circuits on the proper pre-emptive reach of § 301. *See* Supreme Court Rule 17.1(a). As seen below, the rule adopted by the Third Circuit also threatens to undermine the integrity of the collective bargaining process.[18]

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[17] The court cited, but rejected, the contrary holding of the Ninth Circuit in *Bale*, discussed above at note 12. *Anderson*, 803 F.2d at 958. The dissent would have followed *Bale* and argued that the case should be seen as tantamount to a misrepresentation about the terms of the collective bargaining agreement, which would mean, therefore, that resolution of the state-law claims could not be divorced from an analysis of the collective bargaining agreement. *Id.* at 960 (Bright, J., dissenting).

[18] If this petition is granted, CBS will argue on the merits that the Third Circuit misread *Caterpillar* and erred in its application of the *Lueck* test. For

(*Footnote continued*)

II.

A RULE ALLOWING STATE-LAW CLAIMS TO PROCEED ON THESE FACTS WILL INVITE BARGAINING-UNIT MEMBERS TO ABANDON THE ARBITRAL FORUM, WHICH FORUM BEST SERVES THE MANDATE FOR THE DEVELOPMENT AND APPLICATION OF FEDERAL LAW

Paralleling the development of this Court's pre-emption principles has been the Court's recognition that the grievance-arbitration provisions of collective bargaining agreements are particularly sacrosanct. The need to "preserve the effectiveness of [private] arbitration" as a means of achieving industrial peace "was one of the central reasons that underlay the Court's holding in *Lucas Flour*." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202,

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example, before a court can reach the merits of Berda's individual contract claim, it must first determine whether § 1.01 supersedes and precludes enforcement of the alleged individual promise, a determination which would substantially depend upon an analysis of the Agreement. *See* Section 1.01 ("Any changes, supplements or amendments made during the term of this Agreement must be reduced to writing. . .[and] signed by the parties. . .".) (A-27) Secondly, the Third Circuit erred in dismissing CBS' argument that *J.I. Case* precludes enforcement of the alleged pre-employment individual promises of job security as, plainly, no claim could be more inconsistent with the terms of the Collective Bargaining Agreement, which contains specific provisions relating to lay-offs (§ 5.03) and seniority (§ 5.02). (A-30-31) Thirdly, the alleged representation by CBS is tantamount to a misrepresentation about the job security he would enjoy in a bargaining-unit position. Or, more simply, it was a misrepresentation about the terms and conditions of the Collective Bargaining Agreement, resolution of which turns on an analysis of the lay-off and discharge provisions of the Collective Bargaining Agreement. To state a claim for misrepresentation under Pennsylvania law, moreover, Berda would have to show "justifiable" reliance on these representations of job security, which were contrary to the terms of the Collective Bargaining Agreement. *See Scaife Co. v. Rockwell-Standard Corp.*, 446 Pa. 280, 284-285, 285 A.2d 451, 454 (1971), *cert. denied*, 407 U.S. 920 (1972). Resolution of this reliance issue would, therefore, involve the court in an analysis of the terms of the Collective Bargaining Agreement, as Berda, who served as a shop steward in his previous employment, would have to offer evidence of his pre-hire lack of knowledge of the terms and conditions of the Collective Bargaining Agreement, and the legal effect of those provisions.

219 (1985). Indeed, Congress has expressly approved of contract grievance procedures as a preferred method of settling labor disputes. *See* Section 203(d) of the LMRA, 29 U.S.C. 173(d) ("[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. ") A federal common law must, therefore, be developed under § 301 to ensure specific performance of arbitration clauses in collective bargaining agreements, because Congress intended § 301 to be the mechanism for labor peace and "[p]lainly, the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 455 (1957).

Therefore, since the *Steelworkers* trilogy decisions in 1960[19] the Court has stressed that the express policy of the LMRA "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 566 (1960).

To permit this "full play," an order to arbitrate a dispute cannot be denied unless it is clear that the arbitration provision cannot be interpreted to cover the dispute. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). A rule that "permit[s] an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness," as well as "eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." *Lueck*, 471 U.S. at 220 (citation omitted); *see also Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965) (warning against creating exceptions to the requirement that bargaining-unit members be required to resort to the grievance

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[19] *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960).

and arbitration provisions of their contract); *Warrior & Gulf Navigation*, 363 U.S. at 578 (arbitral process is the alternative to economic warfare).

The Third Circuit rule promises to do violence to these interests, as it invites bargaining-unit members to abandon the arbitral forum, which forum best serves the mandate for the development and application of uniform federal labor law to labor-management disputes. If this rule prevails, a bargaining-unit employee who wishes to challenge his discharge, or, potentially, any other term or condition of his employment, need only plead the existence of a pre-employment individual agreement. Those allegations will be sufficient to avoid the grievance and arbitration strictures of his collective agreement, and defeat § 301 pre-emption. This will result even where, as here, the individual agreement squarely conflicts with the terms of a collective bargaining agreement. The Eleventh Circuit in *Varnum* voiced these same concerns, acknowledging that its decision allowing state-law claims to proceed might be "construed to open the floodgates to a myriad of state law actions. . . ." *Varnum*, 804 F.2d at 643 (Hoffman, J., concurring).

This action is tangible proof that the court's fear was well-founded. The Third Circuit rule will now mean that whenever an employer discusses the terms or conditions of employment with a prospective bargaining-unit employee, it risks exposing itself to a state court lawsuit arising from those representations. As a result, courts may now entertain a host of wrongful discharge lawsuits brought by bargaining-unit members seeking to avoid the arbitral forum provided by their collective bargaining agreements.[20]

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[20] The sheer number of recent cases struggling with the issue of whether § 301 pre-empts "independent" contracts shows that *Caterpillar* has not provided clear guidance on this issue. *See, e.g., Ulrich v. Goodyear Tire & Rubber Co.*, ____F.2d____, 132 L.R.R.M. 2321 (6th Cir. September 8, 1989) (state-law claims premised on individual promises of job securitiy following reorganization pre-empted by § 301); *Wells v. General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989)(§ 301 does not pre-empt state-law fraud claims arising from "separation agreement" by which employees would receive severance payment in lieu

(Footnote continued)

More ominously, if the Third Circuit rule prevails, employers may refuse to agree to grievance/arbitration provisions in collective bargaining agreements at all, so as to create a level playing field, knowing that an employee can easily circumvent any such provision by alleging the existence of an "independent" pre-employment agreement. cf. *Lucas Flour*, 369 U.S. at 104 (the "existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral . . . resolution of disputes.")

Secondly, the rule urged by CBS is both logical and fair on these facts. It is not unreasonable or unfair to charge a prospective bargaining-unit employee with knowledge that the terms and conditions of his employment will be dictated solely by his collective bargaining agreement. This argument is even more compelling here. Prior to his employment by CBS, Berda was a shop steward with the local union at television WPXI, and cannot, and does not, claim unfamiliarity with the nature of the collective bargaining process. Berda knew he was accepting a bargaining-unit position and should be charged with the knowledge that the terms and conditions of his employment by CBS would be reflected in the Collective Bargaining Agreement.[21]

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of preserving seniority and rehire rights); *Vacca v. Viacom Broadcasting of Missouri, Inc.*, 875 F.2d 1337 (8th Cir. 1989)(state-law claims by union member against successor employer for violation of allegedly "separate" agreement to pay law school tuition pre-empted by § 301); *DeLapp v. Continental Can Co.*, 868 F.2d 1073 (9th Cir. 1989)(state-law contract claim pre-empted by § 301 where employee argued employer orally promised not to enforce recall provision of collective bargaining agreement so as to preserve early pension benefits); *Miller v. Fairchild Industries, Inc.*, 668 F. Supp. 461 (D. Md. 1987)(§ 301 does not pre-empt state-law fraud and misrepresentation claims premised on promises of job security).

[21] Notwithstanding the arguments raised by respondents below, the rule of pre-emption urged by petitioner will not give employers a license to deceive prospective employees. The conduct alleged by respondents, as even the court below acknowledged, could constitute an unfair labor practice, which will act as a powerful deterrent to employers bent on such a course of deception.

(Footnote continued)

Finally, the Third Circuit rule also threatens to disrupt industrial peace. This Court has recognized that the "ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace." *Lucas Flour*, 369 U.S. at 104; *see also J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944) (the "very purpose" of the collective bargaining process is to "supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group.") State-law which frustrates the effort of Congress to stimulate the smooth functioning of that process "strikes at [its] very core." *Lucas Flour*, 369 U.S. at 104.

On the facts of *Caterpillar*, a rule against pre-emption of the individual contract involved there did no violence to these federal interests, as the individual promises there concerned managerial positions outside the scope of a collective bargaining agreement. 482 U.S at 388, 395 n. 9. Here, however, Berda premises his claims against CBS on individual promises about the terms and conditions of employment in a bargaining-unit position, promises that offer more protection than the Collective Bargaining Agreement, and, in fact, are in complete conflict with the Collective Bargaining Agreement. As this Court has cautioned, the "practice and philosphy of collective bargaining looks with suspicion on such individual advantages," because of their potential to disrupt industrial peace. *J.I. Case Co.*, 321 U.S. at 338. That is because individual gain is "often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole." *Id.* at 338-39. *See also Caterpillar*, 482 U.S. at 396.

The practical effect of such a rule is not difficult to envision. For example, if CBS had not discharged Berda because of the alleged individual promises, to meet its reduction in force goals

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(A-19-20) *See also Caterpillar*, 482 U.S. at 397 (noting that its holding did not preclude the parties from questioning the "legality or viability" of the individual contracts as an unfair labor practice.)

CBS would, potentially, have been forced to lay-off another bargaining-unit member with more seniority, who otherwise would not have been subject to lay-off under § 5.03 of the Collective Bargaining Agreement. At the very least, that bargaining-unit member would then presumably grieve his lay-off under the Collective Bargaining Agreement, with an uncertain result. The rule adopted by the court below will, therefore, inevitably undermine the integrity of the collective bargaining process.

CONCLUSION

Pre-emption of state-law claims under § 301 serves to protect the federal labor law scheme from erosion by courts intent on vindicating state-law rights. The decision of the Third Circuit, if left undisturbed, heralds a significant departure from this goal and invites future litigants to seek ways to skirt the arbitral forum, which lies at the heart of the collective bargaining process. Accordingly, petitioner CBS Inc. respectfully requests that this Court grant this petition in order to review the decision below and thereby provide guidance to the Circuits on the proper pre-emptive reach of § 301.

Dated: October 16, 1989

Respectfully submitted,

DOUGLAS P. JACOBS*
HELEN M. GOLD
ANTHONY M. BONGIORNO
CBS Inc.
51 West 52nd Street
New York, New York 10019
(212) 975-3031

Of Counsel:
ARTHUR J. SCHWAB
MARK A. FONTANA
REED SMITH SHAW & MCCLAY
435 Sixth Avenue
Pittsburgh, PA 15219
(412) 288-3112

Attorneys for Petitioner
CBS Inc.

* *Counsel of record*

APPENDIX

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Filed: July 20, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3405

MARTIN W. BERDA, and
LINDA BERDA, his wife,

Appellants

v.

CBS INC., a corporation,

Appellees

On Appeal From the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 88-0411)

Argued: November 1, 1988

Before: GIBBONS, *Chief Judge*,
BECKER and WEIS,
Circuit Judges

(Filed July 20, 1989)

JOSEPH J. HINCHLIFFE (Argued)
Tarasi and Johnson, P.C.
510 Third Avenue
Pittsburgh, PA 15219

Attorney for Appellant

ARTHUR J. SCHWAB (Argued)
Reed, Smith, Shaw & McClay
435 Sixth Avenue
Pittsburgh, PA 15219-1886

HELEN M. GOLD
CBS Inc.
51 West 52nd Street
New York, NY 10019

Attorneys for Appellee

OPINION OF THE COURT

BECKER, *Circuit Judge.*

This case involves the circuit-splitting question whether state contract and tort claims for monetary relief brought by a bargaining unit employee against his employer based upon alleged misrepresentations of job security, made before the employee became a member of the bargaining unit, thereby conferring additional rights to those afforded by the collective bargaining agreement, are preempted by section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a) (1982).

Appellant Martin Berda ("Berda") brought this suit against his former employer, appellee CBS Inc. ("CBS"), asserting two contract claims (breach of an individual employment contract and promissory estoppel) and two tort claims (fraud and negligent misrepresentation). Appellant Linda Berda, Berda's wife, asserts a derivative claim for loss of consortium. All of the claims are founded upon Pennsylvania law, and the Berdas seek only monetary relief. CBS

contends that since Berda's employment with CBS was governed by the terms and conditions of a collective bargaining agreement between CBS and the International Brotherhood of Electrical Workers ("IBEW") -- a contention not disputed by Berda -- the state law claims are preempted by the LMRA.

The district court concluded that resolution of Berda's claims was dependent upon the collective bargaining agreement, that the alleged oral contract was inconsistent with the collective agreement, and that the claims were therefore preempted by section 301. Consequently, the court granted CBS's motion for judgment on the pleadings or, in the alternative, for summary judgment inasmuch as the complaint was not filed within the six-month statute of limitations applicable to actions arising under section 301. Because we believe that Berda can establish the allegations in his well-pleaded complaint without asking the court to analyze the collective bargaining agreement, we will reverse and remand to the district court for further proceedings.

I.

The facts relevant to this appeal are essentially uncontested. On February 27, 1986, while employed as a technician by station WPXI in Pittsburgh, Berda met with Emil Franks and M. Lynwood Heighes, Jr., employees of CBS, to discuss his possible future employment with CBS in Washington, D.C. According to the complaint, Berda was told at this meeting, among other things, that he would be guaranteed employment with CBS for the reasonably foreseeable future, and that any job offered to him would not be seasonal or temporary but would be a permanent position. CBS subsequently offered Berda employment in Washington, D.C., and, in April 1986, allegedly relying upon CBS's promises, Berda and his wife

moved to Washington so that he could assume his duties as a CBS technician there.

Shortly after commencing work at CBS, Berda joined the IBEW. The parties agree that Berda's employment at CBS was covered by the terms and conditions of a collective bargaining agreement between CBS and the IBEW. Section 5.03 of that agreement pertains to layoffs, and provides in pertinent part that:

> [l]ayoffs caused by a reduction of staff shall be made in the inverse order of seniority within each of the separate units as defined in Section 5.02 within the jurisdiction of each local union. . . .

Section 5.02 of the collective bargaining agreement contains the provisions relating to seniority of all employees covered by the agreement.

On August 29, 1986, less than five months after he began working for CBS, and in accordance with the terms of the collective bargaining agreement, Berda was laid off as part of a company-wide reduction in force. Berda alleges that CBS had decided prior to the February 27 meeting with him to conduct extensive layoffs in the department and division of CBS in which he was eventually offered employment, and hence that Frank and Heighes knew or should have known that their promises and representations to him were false.

On January 19, 1988, Berda filed a complaint in the Court of Common Pleas of Allegheny County, alleging breach of contract (or, alternatively, promissory estoppel) and tortious misrepresentation. The complaint did not refer to the collective bargaining agreement. CBS removed the case to the district court for the Western District of Pennsylvania alleging both federal question jurisdiction, on the ground that the suit was preempted by section 301 of

the LMRA, and thus, if it stated any cause of action, it stated one under section 301, *see Avco Corp. v. Machinists*, 390 U.S. 557, 558 (1968),[1] and diversity jurisdiction.[2] CBS then moved for judgment on the pleadings or summary judgment.

The district court held that any resolution of the state law claims was substantially dependent upon an analysis of section 5.03 of the collective bargaining agreement between CBS and the IBEW and that Berda's alleged individual contract was "inconsistent with section 5.03 ... and would limit or condition its terms." Dist. Ct. Op. at 5 (June 21, 1988). It therefore held that the claims were preempted by section 301 of the LMRA. Finding that the Berdas could not

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1. Ordinarily, a complaint cannot be removed to federal court, pursuant to the court's federal question jurisdiction, unless the complaint on its face states a federal claim. However, the Supreme Court has found that in certain instances the preemptive force of federal law is so "powerful as to displace entirely any state cause of action." *Franchise Tax Bd. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 23 (1983). In such instances, federal law is said to "completely preempt" state law, and removal is permitted because, although pled as a state claim, the claim is actually considered to arise under the federal law that displaces the state law. *Id.* at 24.

Section 301 of the LMRA is one such instance of complete preemption; it displaces entirely "any state cause of action 'for violation of contracts between an employer and a labor organization.'" *Id.* at 23 (citing *Avco*, 390 U.S. at 560). Thus, in *Avco* and subsequent cases, courts have allowed the defendant to remove state contract lawsuits when the suits were preempted by section 301 of the LMRA, even though the plaintiffs had not pled LMRA claims, because such complaints are considered to state a claim, if any, under section 301 of the LMRA. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985).

2. Because the case was properly removed on the basis of diversity jurisdiction, even though, as discussed below, we find that the suit was not preempted by section 301, the case will remain in federal court.

maintain the suit as an LMRA action because it was not filed within the LMRA's six-month statute of limitations, *see DelCostello v. Teamsters*, 462 U.S. 151, 169-72 (1983) (applying six-month statute of limitation in a section 301 cause of action), the district court dismissed the action. The Berdas appeal. The issue before us is whether the district court was correct in concluding that Berda could bring suit, if at all, only pursuant to section 301.[3]

II.

A.

Section 301(a) of the Labor Management Relations Act provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a). On its face, this statute provides for federal jurisdiction over controversies involving collective bargaining agreements. However, the Supreme Court has concluded that section 301 also expresses a congressional intent that the federal courts develop a federal common law to be applied in suits for enforcement of collective bargaining

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3. Our standard of review in an appeal from a grant of summary judgment is plenary. *See Joseph v. Hess Oil*, 867 F.2d 179, 181 (3d Cir. 1989). We must view the facts in the light most favorable to the party against whom judgment is sought and draw all reasonable inferences in favor of the non-moving party. In order to affirm, we must conclude that there are no genuine issues of material fact, and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

agreements. *See Textile Workers v. Lincoln Mills*, 353 U.S. 448, 451 (1957).

When a suit stating a claim under section 301 is brought, state contract law is displaced, and the collective agreement is interpreted under this federal common law. *See Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962). The purpose of preempting state contract law with a uniform federal law is to allow parties to collective bargaining agreements to have some certainty as to the way that the agreement will be construed by courts. As the Supreme Court explained:

> [T]he subject matter of § 301(a) "is peculiarly one that calls for uniform law." ... The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might some day be invoked in enforcing the contract.

Id. at 103 (citation omitted). Lack of certainty as to the meaning of contract terms could lead to lack of agreement; thus, if state laws were not preempted, industrial peace would be threatened. *Id.* at 104.

The Supreme Court has also held that section 301 preemption extends beyond contract claims and reaches certain claims sounding in tort. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985). In *Lueck*, the Court noted that if section 301

were held not to preempt state tort law, it "would elevate form over substance and allow parties to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract." *Id.* at 211. Thus, the Court adopted the following rule: "when resolution of a state-law claim is *substantially dependent upon analysis* of the terms of an agreement made between the parties in a labor contract, the claim must either be treated as a § 301 claim . . . or dismissed as pre-empted by federal labor-contract law." *Id.* at 220 (citation omitted) (emphasis added). *See also International Brotherhood of Electrical Workers v. Hechler*, 107 S. Ct. 2161 (1987) (claim that union breached duty of care to ensure safety of workplace preempted by § 301 because substantially dependent on whether under the collective bargaining agreement the union had assumed this duty).

However, the Supreme Court has made it clear that "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301." *Lueck*, 471 U.S. at 211. In *Lingle v. Norge Div. of Magic Chef, Inc.*, 108 S. Ct. 1877 (1988), the Court held that section 301 did not preempt a state law tort claim for retaliatory discharge, even though the collective bargaining agreement governing the employment provided for arbitral adjudication of an employee's claim that she was fired without just cause. The Court reasoned that in order to prevail on her retaliatory discharge claim she need not ask a court to interpret the collective bargaining agreement. It found that

> even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require

> addressing precisely the same set of facts, as long as the state law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for § 301 preemption purposes.

Id. at 1883.

Finally, and, most importantly, in *Caterpillar, Inc. v. Williams*, 107 S. Ct. 2425 (1987), the Court held that section 301 did not preempt a state *contract* law suit in which plaintiffs, who were union members, alleged that their employer breached individual oral employment agreements that promised them "'indefinite and lasting employment,'" and pre-dated their joining the union. 107 S. Ct. at 2427 (citation omitted). The plaintiffs in *Caterpillar* had been non-union employees of the company at the time the initial alleged promises were made. They were later downgraded to bargaining unit positions, but alleged that they were promised at the time that the downgrades were temporary. *Id.* at 2428. Plaintiffs were subsequently laid off from their bargaining unit positions, and brought suit in state court alleging that their employer had breached the oral agreements in violation of state contract law. The Supreme Court, applying the *Lueck* test, upheld the plaintiffs' right to bring a state contract claim, finding that their "complaint is not substantially dependent upon interpretation of the collective-bargaining agreement. It does not rely upon the collective agreement indirectly, nor does it address the relationship between the individual contracts and the collective agreement." *Id.* at 2431.

Furthermore, the Court in *Caterpillar* held that the fact that as part of a defense of a state law contract claim an employer might raise "a federal question, even a § 301 question" does not mean that the claim

is preempted by section 301. *Id.* at 2433. The preemption of state law engendered by section 301 is only occasioned when the claim raised "on the face of the complaint" substantially depends on interpretation of a collective bargaining agreement for its resolution. *Id.*

In *Caterpillar*, the Court also revisited its decision in *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). *J.I. Case* dealt with the issue of when an employer could have separate individual agreements with unionized employees and when such agreements are subsumed by the collective bargaining agreement such that they can have no independent legal effect. It held that employers and employees could not maintain individual agreements that give an employee less than the employee would be given under the collective bargaining agreement. *Id.* 321 U.S. at 336. To this end, the Court stated that,

> [i]ndividual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement.

Id. at 337.

However *J.I. Case* did not adopt a blanket rule prohibiting individual contracts with bargaining unit members. The Court stated that employers and employees may enter individual contracts that "embody matters not necessarily included within the statutory scope of collective bargaining," to the extent that such contracts are "not inconsistent with a

collective agreement or do[] not amount to or result from or [are] not part of an unfair labor practice." *Id.* at 339. And, most important for the instant case, *J.I. Case* specifically did not hold that individual contracts *more* advantageous to the employee than the collective agreement are subsumed by the collective agreement. Although acknowledging that such individual contracts can be "disruptive of industrial peace," *id.* at 338, the Court declared that,

> individual contracts cannot subtract from collective ones, and whether under some circumstances they may add to them in matters covered by the collective bargain, we leave to be determined by appropriate forums under the law of contracts applicable, and to the Labor Board if they constitute unfair labor practices.

Id. at 339.

Relying on this language from *J.I. Case*, the *Caterpillar* Court rejected the employer's claim that the collective bargaining agreement subsumed the employees' earlier oral contracts for long-term employment which gave them more rights than the collective agreement did. It stated that "individual employment contracts are not inevitably superseded by any subsequent collective agreement covering an individual employee, and claims based upon them may arise under state law." 107 S. Ct. at 2431. And it explained that the employer's basic error was "its failure to recognize that [an employee] covered by a collective-bargaining agreement is permitted to assert legal rights *independent* of that agreement, including state-law contract rights, so long as the contract relied upon is *not* a collective bargaining agreement." *Id.* at 2431-32.

B.

It is undisputed that Berda's employment with CBS was governed by the terms and conditions of the collective bargaining agreement between CBS and the IBEW. However, Berda contends that his contract, promissory estoppel, and tort claims can be resolved independently of the collective bargaining agreement. He asserts that a court, in addressing these claims, need examine only the circumstances surrounding the alleged misrepresentations made to him by CBS before he was hired and the fact that he was laid off.

CBS rejoins that Berda's claims are based on an alleged individual contract which is inconsistent with the terms of the collective bargaining agreement, and that the claims substantially depend on interpretation of the collective agreement. It therefore contends that the claims are preempted by the collective bargaining agreement and that the action must be brought, if at all, under section 301 of the LMRA.

Several of our sister circuits have been faced with similar questions. The Court of Appeals for the Eleventh Circuit has allowed similar state fraudulent misrepresentation claims to go forward, *see Varnum v. Nu-Car Carriers, Inc.*, 804 F.2d 638, 640 (11th Cir. 1986),[4] and a divided panel of the Court of Appeals for the Eighth Circuit has allowed both state fraud and contract claims to proceed based on alleged pre-employment misrepresentations by an employer. *See Anderson v. Ford Motor Co.*, 803 F.2d 953, 955-59 (8th Cir. 1986).

In contrast, prior to the Supreme Court's decision in *Caterpillar*, the Court of Appeals for the Ninth

4. However, the Eleventh Circuit has not allowed state law misrepresentation actions when the alleged misrepresentation took place while the employee was already covered by a collective bargaining agreement. *See Darden v. United States Steel Corp.*, 830 F.2d 1116, 1119-20 (11th Cir. 1987).

Circuit held that state fraudulent misrepresentation claims arising from alleged pre-employment misrepresentations are preempted by section 301. *See Bale v. General Telephone Co.*, 795 F.2d 775, 779-80 (9th Cir. 1986). And, after *Caterpillar*, it has maintained this position. *See Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 997 n.1 (9th Cir. 1987).

All these courts have agreed that the claims are only preempted to the extent that they "substantially depend" on the interpretation of a collective bargaining agreement. However, the courts have differed on the more particular question whether in fact there would be substantial dependence in the case before them. *See Anderson*, 803 F.2d at 958-59 (distinguishing *Bale*). On similar facts they reach different answers.

We believe that *Caterpillar* controls the result in the instant case. As noted above, *Caterpillar* makes clear that in order for there to be section 301 preemption, the plaintiff, in its well-pleaded complaint, must plead an action that requires interpretation of the collective bargaining agreement.[5] *See* supra Typescript at 9-10. Consequently, we must turn to the particular claims raised in Berda's complaint and see if they "substantially depend" on analysis of the collective bargaining agreement. As will be seen, we conclude that Berda's claims are not preempted.

1. The Contract and Promissory Estoppel Count

In his contract and promissory estoppel count, Berda alleges that CBS's pre-employment

5. The complaint must be "well-pleaded;" thus a plaintiff cannot escape preemption merely by failing to plead essential elements of its case.

representation that he would not be laid off constituted a term governing his employment with CBS on which he relied and that CBS breached that term by laying him off. CBS, however, provides us with no argument of substance as to why this count of Berda's complaint requires interpretation of the collective bargaining agreement.

CBS first contends that the contractual claims are preempted because they relate to "the basic terms and conditions of Mr. Berda's employment." Appellee's Br. at 8. However, Berda's contract claims are very similar to the plaintiffs' claims in *Caterpillar*. In *Caterpillar*, the Supreme Court held that claims of pre-existing employment contracts for long-term employment were not preempted by section 301. *See* supra Typescript at 9.

CBS next contends that Berda's oral agreement is inconsistent with sections 5.02 and 5.03 (the seniority and layoff provisions) of the collective agreement, as well as the provision of the collective bargaining agreement that makes the IBEW the exclusive bargaining agent of the employees, and the provision that requires that supplements and amendments to the collective bargaining agreement must be made in writing and be agreed to by CBS and the IBEW. CBS contends, therefore, that Berda's claims are "necessarily subsumed into the collective bargaining agreement," and thus that Berda's action "arises, if at all, under Section 301 of the LMRA." Appellee's Br. at 10.

However, as noted above, *Caterpillar* made it clear that not all pre-employment contracts are subsumed by the collective bargaining agreement. *See* supra Typescript at 10-12. Indeed, as in *Caterpillar*, the oral agreement at issue in the instant case gave an advantage to the employee, and thus, as in *Caterpillar*, we cannot say that the oral agreement

was subsumed by the collective agreement such that no state cause of action can be premised on the oral contract. We note, as the Supreme Court noted in both *J.I. Case* and *Caterpillar*, that whether an employee can get relief under an individual agreement that gives him an advantage beyond the rights he has under the collective bargaining agreement should "'be determined by appropriate forums under the law of contracts applicable, and by the Labor Board if they constitute unfair labor practices.'" *Caterpillar*, 107 S. Ct. at 2431 (quoting *J.I. Case*, 321 U.S. at 339).

We are not currently presented with the question whether the existence of a subsequent collective bargaining agreement may constitute a defense to Berda's contract claim under state or federal law.[6] Nor are we presented with the question whether the oral agreement is void because it constitutes an unfair labor practice. We are only concerned in this appeal with section 301 preemption, and the Supreme Court has made clear that section 301 does not preempt state contract causes of action premised on pre-employment agreements that are advantageous to the employee. *See Caterpillar*, 107 S. Ct. at 2431 (plaintiff can assert state contract rights "so long as the contract relied upon is *not* a collective-bargaining agreement"). Because the contract count of Berda's complaint is not substantially dependent on interpretation of the collective bargaining agreement under *Caterpillar*, his contract claims are not preempted under section 301 of the LMRA, and thus we must reverse so that he may pursue them on remand, in the district court.[7]

---

6. As noted above, the Supreme Court has held that the possibility that a federal claim may be raised in the defense of a contract suit does not mean that the state contract claim is preempted under section 301. *See* supra Typescript at 10.

7. CBS urges that language from this Court's opinion in *Malia v. RCA Corp.*, 794 F.2d 909 (3d Cir 1986), requires that we find

2. The Tort Claims

Berda also asserts claims for fraud and negligent misrepresentation. As noted above, the Supreme Court, in *Lueck*, stated that "[i]f the policies that animate § 301 are to be given their proper range . . . the preemptive effect of § 301 must extend beyond suits alleging contract violation." *Lueck*, 471 U.S. at 210. However, the Court then set forth the rule that a state-law tort claim is preempted by § 301 only if its resolution is "substantially dependent upon analysis of the terms of a collective bargaining agreement." *Id.* at 220.[8]

Berda's prior contract to be subsumed into the collective agreement. *Malia* held that an employee who had formerly been in a bargaining unit, but was promoted out of the bargaining unit, could maintain state law contract and tort claims based on representations made at the time he was promoted that he could be reinstated in the bargaining unit position if he so desired.

In *Malia*, we said that the LMRA does not "prevent an individual -- whether an applicant for new employment or a current employee in a supervisory position – from negotiating for a job in a bargaining unit so long as that employment will be on the terms and conditions set forth in the collective bargaining agreement." 794 F.2d at 913. CBS suggests that this language precludes an employee from maintaining a state law suit based on a pre-employment agreement that is separate from the collective bargaining agreement. We believe the language to be ambiguous. However, to the extent that that language suggests that an employee can never sue on a pre-employment agreement giving him more rights than the collective bargaining agreement, we believe that it does not survive *Caterpillar*. As noted above, in *Caterpillar* the Supreme Court allowed employees to sue on an independent contract that gave them additional rights, despite their subsequent union membership. *See supra* Typescript at 16.

8. At another point in the *Lueck* opinion, the Court stated that state tort claims would be preempted only if "inextricably intertwined with consideration of the terms of the labor contract". 471 U.S. at 213. Taking this phrase in the context of the whole opinion, we believe that the Court intended this as a statement equivalent to "substantial dependence."

To maintain a misrepresentation claim under Pennsylvania law, the plaintiff must establish:

> 1) a false representation of an existing fact ...; 2) if the misrepresentation is innocently made, then it is actionable only if it relates to a matter material to the transaction involved; while if the misrepresentation is knowingly made or involves a non-privileged failure to disclose, materiality is not a requisite to the action ...; 3) scienter, which may be either actual knowledge of the truth of falsity of the representation, reckless ignorance of the falsity of the matter, or mere false information where a duty to know is imposed on a person by reason of special circumstances, ... 4) reliance which must be justifiable, so that common prudence or diligence could not have ascertained the truth; and, 5) damage to the person relying thereon.

Shane v. Hoffman, 227 Pa. Super. 176, ___, 324 A.2d 532, 536 (1974).

When we consider these elements, it becomes clear that Berda was not required to refer to the collective bargaining agreement in order to state his tort claim. Instead, as Berda contends, in order to maintain a suit for misrepresentation, he need only plead and establish that Franks and Heighes promised him that he would not be laid off for a reasonable period of time although they knew (or were reckless in not knowing) that in fact CBS was planning a reduction in force that would affect him, that he reasonably relied on this misrepresentation, and that his reliance damaged him.

CBS contends that resolution of this tort claim does depend on interpretation of a collective bargaining agreement because "[t]here is no escaping the fact that the alleged misrepresentations relate to

the specific terms of Mr. Berda's employment by CBS in a bargaining unit position controlled by a collective bargaining agreement which speaks to those very terms." Appellee's br. at 16. However, that the misrepresentations concerned layoffs and that there was a provision of the collective bargaining agreement that also related to layoffs are facts of no consequence, because Berda need not refer to the provision in the collective bargaining agreement in order to make out his claim. Despite CBS's intimations, Berda need not establish that the oral promise made to him prior to his employment differed from the terms of the collective bargaining agreement in order to get relief. *See Lingle*, 108 S. Ct. at 1882-83 (holding that plaintiff may pursue state tort claim that does not involve construing collective bargaining agreement, even if collective bargaining agreement also provides remedy for wrong).

Finally, CBS contends that allowing Berda to proceed with his state law claims would be disruptive of industrial peace. The Supreme Court observed in *J.I. Case* that contracts which give an advantage to individual employees can be disruptive. Demonstrably, regardless of whether the employer is acting maliciously or innocently, the very existence of individual contracts that give certain employees better terms than the union has obtained for them can undermine the employees' support for the union and lead to industrial discord.

However, section 301 preemption is not the only, or even the primary, tool available for promoting industrial peace. As discussed above, section 301 preemption has the limited purpose of ensuring that a uniform law is applied in interpreting collective bargaining agreements. To the extent that conduct (including a company practice of entering into contracts that give advantages to individual

employees) constitutes an unfair labor practice that is damaging to the union, the union can file a grievance with the National Labor Relations Board. *See Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684 (1944) (it is an unfair labor practice to by-pass union and bargain directly with individual employees as to "wages hours and working conditions").

Furthermore, we note, as the Supreme Court noted in *Caterpillar*, that section 301 is not the only type of preemption applicable in labor cases.

> The employer may argue [in the state law suit] that the individual employment contract has been pre-empted due to the principle of exclusive representation in § 9(a) of the National Labor Relations Act (NLRA), 29 U.S.C. § 1599(a).... Or the employer may contend that enforcement of the individual employment contract arguably would constitute an unfair labor practice under the NLRA, and is therefore pre-empted....

107 S. Ct. at 2432. But these doctrines are distinct from section 301 preemption. Only section 301 preemption converts the state law claim to a section 301 claim so that the statute of limitations for section 301 applies. For the foregoing reasons, we hold that neither Berda's contracts claims nor his tort claims are preempted by section 301 of the LMRA, and thus we conclude that the statute of limitations for section 301 actions does not apply. Therefore, the district court erred and we must reverse. We hold that Berda may proceed in the district court on his state contract and tort claims.

III.

CBS raises two other legal contentions on this appeal. First, it contends that the district court should have dismissed the case as preempted by the

National Labor Relations Act, under the doctrine of preemption articulated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Second, it contends that Berda's tort count actually alleges a wrongful discharge claim and that Pennsylvania law does not allow an employee who was a member of a union to bring such a claim.

These contentions were not passed upon by the district court. Generally, in the absence of "exceptional circumstances," we decline to "consider an issue not passed upon below." *Selected Risks Insurance Co. v. Bruno*, 718 F.2d 67, 69 (3d Cir. 1983). We find no exceptional circumstances here. Hence these questions must be addressed by the district court in the first instance.

In light of the foregoing, the judgment of the district court will be reversed, and the case will be remanded for further proceedings.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing, Phila., Pa. 215-568-4264)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

July 20, 1989

TO: Joseph J. Hinchliffe, Esq. *
Arthur J. Schwab, Esq.
Helen M. Gold, Esq.

NOTICE OF JUDGMENT

This Court's opinion was filed and Judgment was entered today in case No. 88-3405 and copies are enclosed herewith.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MARTIN W. BERDA and LINDA BERDA, his wife,	)	
Plaintiffs	)	
v.	)	Civil Action No. 88-411
CBS INC., a corporation,	)	
Defendant	)	

MEMORANDUM OPINION

Presently before the Court is a motion by defendant CBS Inc. for judgment on the pleadings or, in the alternative, for summary judgment.

Defendant's motion will be granted and plaintiffs' complaint will be dismissed for reasons set forth below.

I.

Plaintiffs made the following allegations in their complaint.

Plaintiff Martin Berda previously had been employed by television station WPXI in Pittsburgh, Pennsylvania.

Mr. Berda met with Mr. Emil Franks and Mr. M. Lynwood Heighes, agents of CBS, on February 27, 1986. At that meeting, Franks and Heighes made a number of representations to Mr. Berda which were designed to induce Mr. Berda to leave his job at WPXI and to come to work for CBS in Washington, D.C. They represented, among other things, that Mr. Berda would have employment with CBS for the reasonably foreseeable future without fear of lay-off; and that any job offered to Mr. Berda would be a permanent position and would not be seasonal or temporary.

CBS subsequently offered Mr. Berda employment in Washington, D.C. Mr. Berda then resigned his position with WPXI and began working for CBS on April 14, 1986. A collective bargaining agreement between CBS and the International Brotherhood of Electrical Workers was in effect at the time that Mr. Berda began working for CBS.

Mr. Berda was laid off by CBS on August 29, 1986, less than five months after he began working for CBS, as part of a company-wide reduction in work force. Plaintiffs allege that CBS already had decided prior to the meeting of February 27, 1986 to conduct extensive lay-offs in the department and division of CBS in which Mr. Berda eventually was offered employment.

All of plaintiffs' claims are based on state-law rights of action. Count I is for fraud and negligent misrepresentation. Count II is for breach of contract and promissory estoppel. Count III is for loss of consortium.

II.

The issue presently before the Court is whether plaintiffs' claims, which are formulated as state-law claims, in fact arise under a collective bargaining agreement and therefore must be resolved under federal law pursuant to 29 U.S.C. § 185(a).

29 U.S.C. § 185(a) provides a federal right of action for violations of contracts between an employer and a labor organization representing employees. It specifically provides that:

> Suits for violation of contracts between an employer and a labor organization, representing employees in an industry affecting commerce...may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

This statutory provision evidences a Congressional intention that *federal* common law, as opposed to state common law, should

be applied to cases involving a collective bargaining agreement. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1987).

Although Congress did not indicate the extent to which it intended 29 U.S.C. § 185(a) to preempt state law, the Supreme Court recently stated that:

> questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort.

Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211 (1985). A state-law claim should either be treated as a claim arising under 29 U.S.C. § 185(a) or dismissed as preempted by federal labor-contract law when its resolution "is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Lueck*, 471 U.S. at 220. The focus of inquiry in determining such preemption must be on the nature of the state-law claims because state-law claims that are independent of a collective bargaining agreement are not preempted. *See Malia v. RCA Corp.*, 794 F.2d 909, 912 (3d Cir. 1986), *cert. denied*, 107 S.Ct. 3210 (1987).

In addition, while individual contracts between an employer and an employee are not altogether precluded by the existence of a collective bargaining agreement, the collective bargaining agreement must prevail to the extent that the individual contract is inconsistent with it. *See J.I. Case Co. v. NLRB*, 321 U.S. 332, 337-39 (1944). An individual contract may not limit or condition or subtract from the terms of a collective bargaining agreement. *Id.*

III.

The oral agreement Mr. Berda alleges he entered into with CBS provides, essentially, for his continued employment with CBS, without regard to his seniority (or lack thereof), in the event that CBS should decide to reduce its work force through lay-offs.

Plaintiffs' action is governed by 29 U.S.C. § 185(a) because their claims ultimately depend upon the interpretation of a provision in the collective bargaining agreement in effect at the time between CBS and the International Brotherhood of Electrical Workers. Section 5.03 of the collective bargaining agreement pertains to lay-off. It provides in pertinent part that:

> Layoffs caused by a reduction of staff shall be made in the inverse order of seniority within each of the separate units as defined within Section 5.02 within the jurisdiction of each local union....

Plaintiffs' action also arises under 29 U.S.C. 185(a) because the alleged oral agreement which underlies their state-law claims is inconsistent with Section 5.03 of the collective bargaining agreement and would limit or condition its terms.

Mr. Berda was laid off on August 29, 1986. Plaintiffs' action was not commenced, however, until January 19, 1988, some seventeen months later. The six-month limitation period set forth at 29 U.S.C. § 160(b) governs actions arising under 29 U.S.C. § 185(a). *See Del Costello v. Teamsters*, 462 U.S. 151, 169-72 (1983). Plaintiffs' action therefore will be dismissed as time-barred.

An appropriate order will be issued.

Dated: June 15, 1988.

/s/ Hubert I. Teitelbaum

Hubert I. Teitelbaum
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MARTIN W. BERDA and LINDA BERDA, his wife,	)	
Plaintiffs	)	
v.	)	Civil Action No. 88-411
CBS INC., a corporation,	)	
Defendant	)	

ORDER

AND NOW, June 15, 1988, for reasons set forth in the foregoing Memorandum Opinion, IT IS HEREBY ORDERED that the above-captioned case is dismissed.

/s/ Hubert I. Teitelbaum
Hubert I. Teitelbaum
United States District Judge

cc: Joseph J. Hinchliffe, Esq.
Tarasi & Johnson
510 Third Avenue
Pittsburgh, PA 15219
For Plaintiffs

Arthur J. Schwab, Esq.
Pamela A. McCallum, Esq.
Reed Smith Shaw & McClay
435 Sixth Avenue
Pittsburgh, PA 15219

Helen M. Gold, Esq.
CBS Inc.
51 West 52nd Street, 36th Floor
New York NY 10019
For Defendant

EXCERPTS FROM COLLECTIVE BARGAINING AGREEMENT

ARTICLE I

Section 1.01.

* * * * *

(c) Any changes, supplements or amendments made during the term of this Agreement must be reduced to writing, numbered serially, signed by the parties hereto, signed by each Local Union and approved by the International President of the IBEW, and then shall become a part of this Agreement.

* * * * *

Section 1.02. Recognition and Scope. (a) The Employer recognizes the right of Technicians covered by this Agreement to self-organization and to bargain collectively through representatives of their own choosing and, accordingly, hereby recognizes the IBEW as the sole and exclusive bargaining agent for all Technicians.

(b) This Agreement covers employment by CBS (including any Division or subsidiary) involving any of the work specified in Section 1.03 hereof when done in connection with the production and/or recording of material for broadcast, theatre, or pay television, film-tape or tape-film transfer or standard conversion or recording processes in connection with broadcasting and those types of closed-circuit upon which Technicians have been or are now performing services. In no event shall anything contained in this paragraph be construed as adversely affecting any work currently being performed by Technicians under this Agreement.

ARTICLE II

Section 2.01. Grievance Procedures. In order to provide for the equitable and efficient settlement of disputes and controversies on specific questions arising under this Agreement, it is agreed that the procedures set forth in this Article II of this Agreement will govern the conduct of the parties.

Section 2.02. Initiating Grievance Procedures. (a) There shall be a Local Union-Management Grievance Committee, composed of not more than three (3) representatives of the Local Union and not more than three (3) representatives of the Employer. Upon written notice by either party to the other, this Committee shall meet within five (5) working days. The request for such meeting shall state the question or questions to be discussed.

(b) If agreement cannot be reached by the Committee within ten (10) working days (or within an extension of this period of time, as may be mutually agreed upon by the Committee) of its initial meeting, either of the local parties shall request approval from its respective headquarters office of said local party's issuance of a formal demand for arbitration (to the other local party) and, when such approval is granted, arbitration of the issue(s) shall proceed at the city of origin of same not later than fourteen (14) days after the receiving party has been served with the arbitration demand.

(c) Where any issue has been brought to the attention of one party by the other and the aggrieved party has not notified the other of its desire to arbitrate for a period of six (6) months subsequent to the date upon which such issue was first brought before the Committee, the issue shall be deemed finally waived and disposed of and may not be subsequently arbitrated.

Section 2.03. Arbitrators. An individual Arbitrator in each case shall be selected by the parties pursuant to the rules of the American Arbitration Association.

Section 2.04. Arbitration Rules, Procedures.

(a) After following the procedures set forth in Section 2.02 (above), either party may request arbitration by delivering a signed, written notice to the other party and to the American Arbitration Association.

(b) Arbitration shall be conducted pursuant to applicable laws and statutes and the rules and regulations of the American Arbitration Association. The Arbitrator shall have the exclusive right and obligation to determine whether or not there is an arbitrable issue; provided, however, that decisions shall be limited to the determination of grievances arising under this Agreement and any matters stated to be not arbitrable by the terms of this Agreement shall not be considered. Nothing in this Article II shall be construed as prohibiting the National parties to this Agreement from participating in any arbitration hereunder.

(c) Any decision or award of an Arbitrator shall be final and binding upon both parties, whether rendered prior to or following the expiration of the term of this Agreement, and may be enforced or reviewed in any court of competent jurisdiction, but shall not include an amendment or addition to the terms of this Agreement.

(d) A final decision or award by an Arbitrator shall be made within fourteen (14) days following the close of the hearing. No such decision or award shall be made retroactive to a time earlier than six (6) months prior to that date upon which the grievance was first initiated under Section 2.02 hereof.

(e) Decisions or awards shall remain effective until the expiration of the original term of this Agreement or until the expiration of any extension of said term.

(f) Each party will bear its own expense of arbitration and will equally share the fees and expenses of the Arbitrator(s).

Section 2.05. Special Procedures for Discharge Grievance and Arbitration. Notwithstanding the procedures set forth above, questions arising out of the discharge of a Technician shall be treated expeditiously in a manner agreed upon by the Local Union-Management Grievance Committee.

Section 5.02. Seniority. Within the jurisdiction of each Local Union, the seniority of all employees covered by this Agreement shall be determined as follows:

(a) The seniority of each Technician shall start as of the date that each Technician was employed by the Employer to perform work as specified in Section 1.03 hereof, except that the seniority date for those Assistant Technicians reclassified as a result of this Agreement shall be October 1, 1969.

(b) At San Francisco, all Technicians presently on the staff will be credited with seniority from the date of their initial employment with KQW or KCBS, as the case may be.

(c) At Chicago, all Technicians presently on the staff of WBBM-TV will be credited with seniority from the date of their initial employment with WBKB or WBBM-TV, as the case may be.

(d) At Washington, all Technicians presently on the staff will be credited with the seniority shown on the mutually certified seniority list.

(e) At St. Louis, all Technicians presently on the staff of KMOX shall be credited with seniority from the date of their initial employment with KMOX. All Technicians presently on the staff of KMOX-TV shall be credited with seniority from the date of their initial employment with KWK, KWK Incorporated, or KMOX-TV. It is understood that there shall be two separate seniority lists; a seniority list for KMOX and a seniority list for KMOX-TV. Those Technicians hired subsequent to September 30, 1972, shall be credited with seniority from the date of their initial employment with KMOX or KMOX-TV and shall have their names placed on the appropriate seniority list as the case may be.

(f) Seniority for staff Technicians at CND News Bureaus in cities outside the jurisdictional radii set forth in Section 1.04(2) of this Agreement shall be credited on a separate basis for each bureau beginning on the date the Technician starts employment at such bureau.

Section 5.03. Layoffs and Re-hires. (a) Layoffs caused by a reduction of staff shall be made in the inverse order of seniority within each of the separate units as defined in Section 5.02 within the jurisdiction of each local union. Any Technician who is laid off shall receive three (3) weeks' notice of such layoff or three (3) weeks' pay in lieu of such notice. In addition to such aforementioned notice of layoff, or pay in lieu thereof, CBS shall pay severance pay to any Technician who is laid off, according to the scale set forth in Section 5.11.

Supreme Court, U.S.
FILED
DEC 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-589

In The

Supreme Court of the United States

October Term, 1989

CBS INC.,

Petitioner,

vs.

MARTIN W. BERDA and LINDA BERDA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LOUIS M. TARASI, JR.*

TARASI & JOHNSON, P.C.
510 Third Avenue
Pittsburgh, PA 15219
(412) 391-7135

Attorneys for Respondents

*Counsel of record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER-STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

1. When a prospective employer induces an applicant for employment to accept a position covered by a collective bargaining agreement using false and fraudulent promises and misrepresentations, regardless of the federal concern with collective bargaining agreements, can not the applicant maintain well-established, independent state law actions for breach of contract, promissory estoppel and fraud against the employer.

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COUNTER-STATEMENT OF THE CASE

This action for fraud, promissory estoppel, and breach of contract arises from the misrepresentations of petitioner CBS Inc's employees to Respondents Martin and Linda Berda.[1] Mr. and Mrs. Berda filed suit against CBS in the Court of Common Pleas of Allegheny County, Pennsylvania, and thereafter CBS removed this case to the United States District Court for the Western District of Pennsylvania on the basis of federal question and diversity of citizenship jurisdiction. CBS filed an Answer denying liability and raising pre-emption of state law by the federal labor law as an affirmative defense. Thereafter, CBS moved for Judgment on the Pleadings, or in the alternative, Summary Judgment. After briefing, the District Court (per Hubert I. Teitelbaum, J.) dismissed this action ruling that Plaintiffs' claims were pre-empted by the Labor Management Relations Act, §301, 29 USC §185(a).[2] The Berdas appealed, and the United States Court of Appeals for the Third Circuit reversed the trial court's decision and held that there was no pre-emption

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[1] It is not correct to characterize the claims of Linda Berda as purely for loss of consortium since she also quit her job and agreed to put the family home on sale on the basis of what CBS representatives had told her husband.

[2] The Labor Management Relations Act §301, 29 USC §185(a) provides:

> Suits for violation of contracts between an employer and a labor organization, representing employees in an industry affecting commerce . . . may be brought in any district court of the United States . . .

of Plaintiffs' state law claims by §301 of the Labor Management Relations Act, 29 U.S.C. §185.[3] The Petition by CBS followed.

The facts of this case are quite simple. While still an employee of TV Station WPXI in Pittsburgh, Martin Berda was interviewed for a job at CBS in Washington, D.C. At this pre-employment interview with Emil Franks and M. Lynnwood Heighes, Jr. of CBS, Berda asked about job security and other matters and was told, *inter alia*, that if he accepted the job with CBS, he was guaranteed employment for the reasonably foreseeable future. Relying on CBS's misrepresentations, the Berdas quit their jobs in Pittsburgh, put their house on the market for sale and moved to Washington, D.C. Less than five months after beginning work with CBS, Berda was laid off pursuant to the terms of the collective bargaining agreement as part of a company-wide reduction in force.

REASON FOR REFUSING THE WRIT

Only last year this Court handed down a decision to guide the Circuit and District Courts on the method of determining whether state law claims are pre-empted by §301 of the Labor Management Relations Act: *Lingle v. Norge Division of Magic Chef*, 486 U.S. 399 108 S.Ct. 1877 (1988). In the prior year, the Court had handed down another opinion on the same subject in *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987). These two cases provide

[3] Petitioners did not raise below the applicability of 29 U.S.C. §173(d).

crystal clear guidance on the issue of §301 pre-emption analysis, but they have not yet had an opportunity to work their way through the judicial system.[4] Of the cases relied upon by petitioners to show a conflict in the circuits, all but one case was decided prior to this Court's decision in *Caterpillar* and all of the decisions were decided before *Lingle*. *See*, Petitioner's brief at 12-13. Without directly ruling on the issue of pre-emption of state law claims for pre-employment representations, this Court has already provided the mode of analysis for lower courts to resolve pre-emption difficulties. At this time, no further guidance from the Supreme Court is necessary on this issue.

In *Lingle*, this Court stated,

> [I]f the resolution of a state law claim depends upon the meaning of a collective bargaining agreement, the application of state law . . . is pre-empted.

486 U.S. at ___, 108 S.Ct. at 1881.

The converse of this proposition is also true. When Plaintiff's claim does not require construction of a collective bargaining agreement, the claim is not pre-empted by federal law. *Id.* at n.4. Thus the determination of whether a claim is pre-empted by §301 turns on a close analysis of the applicable state law. Generally, this Court defers to the Courts of Appeals in construing state law, and a case which turns so much on state law ought not to be

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[4] In the present case, for example, the District Court reached its opinions without reference to *Lingle* which was decided less than ten days before the District Court's Opinion was announced.

reviewed by this Court.[5] Finally, the inability of Petitioners to find a conflict in Circuit Court decisions rendered after *Lingle* suggests two points. First, there is no longer confusion in the lower courts about the correct procedure for §301 pre-emption analysis. Second, there are very few cases in the lower courts dealing with this sort of pre-emption issue. This second conclusion indicates that Circuit and District Courts have had very little opportunity to apply *Lingle*, and that it needs to be construed by the lower courts before a conflict about this law can appear, if one ever will. It also suggests that Petitioner's and amicus's claims of disruption to industrial peace occasioned by the Third Circuit's decision are greatly exaggerated.

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[5] In footnote 18 of its petition, CBS gives some indication of its arguments on the merits. Its first two arguments do not concern the issues now before the Court. They are matters not considered by the District Court and expressly reserved by the Court of Appeals. Finally CBS argues that Berda could never show justifiable reliance on what he was told because the issue requires reference to the collective bargaining agreement. CBS is wrong. Berda will testify that he relied on the statements that he would have a job – never was he referred to any collective bargaining agreement. Under Pennsylvania law, where the means of securing information are not equal, as here, the positive representation of the person who is supposed to possess superior means of information may be relied upon. *Emery v. Third National Bank of Pittsburgh*, 315 Pa. 544, 171 A. 879 (1934); *Siskein v. Cohen*, 363 Pa. 580, 70 A.2d 293 (1950); *Lake v. Thompson*, 366 Pa. 352, 77 A.2d 293 (1951). Moreover, Plaintiffs may justifiably rely on oral representations contrary to writings otherwise available. *Soltan v. Shahboz*, 383 Pa. 474, 119 A.2d 261 (1956); *Arolette v. National Liberty Insurance*, 312 Pa. 442, 167 A. 295 (1933); *Vernon v. Wilson*, 31 Pa.Super 257 (1906).

Although in its opinion the Third Circuit indicated that there is a split of authority on the subject in existing case law among the Circuit Courts, this split of authority has now been resolved by this Court's prior decision in *Lingle*. In the present case, the Third Circuit correctly analyzes the law in light of *Lingle* and *Caterpillar*, and further clarification of this Court's decisions are unnecessary. This Court should not grant certiorari to resolve a conflict in the circuits concerning pre-emption which it has already adequately resolved.

CONCLUSION

For the foregoing reasons, it is submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Louis M. Tarasi, Jr.*
Tarasi & Johnson, P.C.
510 Third Avenue
Pittsburgh, PA 15219
(412) 391-7135

Attorneys for Respondents

*Counsel of record

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No. 89-589

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

CBS INC.,
Petitioner,

vs.

MARTIN W. BERDA AND LINDA BERDA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE, MERCHANTS AND MANUFACTURERS ASSOCIATION, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CHARLES G. BAKALY, JR.
(Counsel of Record)
DEBRA L. BOYD
MICHAEL A. CURLEY

O'MELVENY & MYERS
Citicorp Center
153 East 53rd Street
New York, New York 10022-4611
(212) 326-2000
Attorneys for Amicus Curiae,
Merchants and Manufacturers Association

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MOTION OF MERCHANTS AND MANUFACTURERS ASSOCIATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Merchants and Manufacturers Association (the "Association") moves the Court for leave to file the attached brief of amicus curiae in support of the Petition for Writ of Certiorari. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondents was requested but refused.

I

NATURE OF THE INTEREST OF THE MERCHANTS AND MANUFACTURERS ASSOCIATION

The Association is a non-profit California corporation. Its purpose is to augment the human resources management of member firms. Over 3,700 companies of varying sizes and industries are members of the Association. The members collectively employ over one million employees.

Many of the Association's members are parties to collective bargaining agreements with labor unions. It is of especial concern to the Association's members that courts eschew rulings that would permit union employees to rely on individual employment agreements which are contrary to the terms and conditions negotiated by the union representative in the collective bargaining process. In addition, the Association's members believe it is crucial that courts preserve established federal labor law policy which mandates that claims such as respondent's be resolved through the arbitration and grievance procedures agreed to by the parties to the collective bargaining agreement, rather than through state court actions. It is equally important to the members of the Association that clear and uniform federal law be applied to interpret and enforce collective bargaining agreements.

II

ISSUES TO BE ADDRESSED BY THE ASSOCIATION

The decision below bears significantly on all of the above precepts of federal labor policy. The legitimacy of that decision turns on an employee's power to circumvent the terms set forth in a collective bargaining agreement

and to negotiate and retain the benefit of individual agreements, despite the extraordinary preemptive force of Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("Section 301"). The Association's brief addresses the conflict among several circuit courts of appeals which have ruled variously on similar facts, examines the failure of the court below to adhere to this Court's authority, and discusses the practical effect of the rule adopted below in the negotiation and administration of a collective bargaining agreement.

The Association submits that its experience in labor related matters, as well as its appearance as amicus curiae in pertinent forums, including an appearance before this Court in *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987), gives it the unique ability to focus on the long term impact of the decision below on federal labor policy. In addition, the Association is able to develop more fully the consequences of the lower court's decision on large and small employers alike, in particular, the difficulty of administering a collective bargaining agreement if various state laws are deemed to abrogate it and the unattractiveness of agreeing to a labor contract containing grievance and arbitration provisions which are easily circumvented.

For the foregoing reasons, the Court should grant this Motion for Leave to File Brief of Amicus Curiae in Support of the Petition for Writ of Certiorari.

Dated: November 13, 1989.

Respectfully submitted,

CHARLES G. BAKALY, JR.
(Counsel of Record)
DEBRA L. BOYD
MICHAEL A. CURLEY

O'MELVENY & MYERS
Citicorp Center
153 East 53rd Street
New York, New York 10022-4611
(212) 326-2000

Attorneys for Amicus Curiae, Merchants and Manufacturers Association

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BRIEF OF AMICUS CURIAE, MERCHANTS AND MANUFACTURERS ASSOCIATION, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DESCRIPTION OF INTEREST OF AMICUS CURIAE

The Merchants and Manufacturers Association ("the Association") adopts the statement made in the Motion for Leave to File Brief, immediately preceding this brief, as the description of the interest of amicus curiae.

CONSENT OF PARTIES

Respondents to this action refused consent to the filing of this brief by the Association. A motion for leave to file this brief is attached. Petitioner has consented to the filing of this brief and written consent will be filed concurrently.

STATEMENT OF THE CASE

The Association adopts the Statement of the Case set forth in the Petition for Writ of Certiorari, as well as Petitioner's description of the Opinions Below, Jurisdiction, Statutory Provisions and the Questions Presented.

ARGUMENT

I.

THIS COURT SHOULD GRANT REVIEW TO RESOLVE CONFLICT REGARDING THE SCOPE OF SECTION 301 PREEMPTION OF STATE LAW CLAIMS.

A. Preliminary Statement.

The court below held that state law causes of action for breach of contract and fraud, brought by a union employee who was laid off in a company-wide reduction in force, were not preempted by Section 301 of the Labor

Management Relations Act, 29 U.S.C. § 185 ("Section 301").[1] The Third Circuit's decision ignores the fact that the gravamen of respondent's complaint is that he was wrongfully discharged from a collective bargaining unit position — a claim long recognized as one arising under Section 301 and one subject to grievance and arbitration if (as here) the labor contract contains such provisions. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). In a decision at odds with this Court's case authority and the law of other federal circuit courts of appeals, the court below determined that respondent's purported individual pre-hire employment agreement had an existence independent of the collective bargaining agreement that governed the terms and conditions of his employment. The decision permits respondent to circumvent the grievance and arbitration provisions of his collective bargaining agreement by virtue of his allegation that prior to being hired by CBS as a union employee, various representations were made to him about job security and protection from layoffs — representations which were inconsistent with the collective bargaining agreement.

The resolution of respondent's claims depends on an interpretation of the labor contract which governed the terms and conditions of respondent's employment at the time of his layoff, because the court must look to the collective bargaining agreement to determine whether respondent justifiably relied on the purported individual promises and whether respondent can establish a valid oral or implied contract in the face of a contrary written agreement. Application of federal law to state law causes

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[1]The Association's brief addresses the claims of respondent Martin Berda only. Respondent Linda Berda's claim for loss of consortium is derivative.

of action which depend, for their resolution, on an interpretation of a collective bargaining agreement, is of vital importance to employers and unions alike, and is in accordance with the Congressional mandate that federal labor law be uniform in substance and consistent in application. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 209-10 (1985); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

The decision below jeopardizes the continued uniformity and consistency in the application and interpretation of federal labor law. If the decision stands, pre-hire agreements will be subject to the inevitably inconsistent interpretation of some fifty jurisdictions. It will spawn countless lawsuits from disgruntled union employees unhappy with the terms of employment in their collective bargaining agreement and with the grievance and arbitration remedies contained therein. Because the decision below has a pervasive impact on the negotiation and administration of collective bargaining agreements and on employers, employees and labor unions nationwide, the Association urges this Court to grant certiorari in this matter.

B. The Decision Below Conflicts With Decisions Of Other Circuit Courts Of Appeals.

Two other Circuit Courts of Appeals have agreed with the court below that Section 301 does not preempt state law claims based on individual pre-hire agreements concerning a position covered by the collective bargaining agreement. *Anderson v. Ford Motor Co.*, 803 F.2d 953 (8th Cir. 1986), *cert. denied*, 483 U.S. 1011 (1987); *Varnum v. Nu-Car Carriers, Inc.*, 804 F.2d 638 (11th Cir. 1986), *cert. denied*, 481 U.S. 1049 (1987). In each of these cases the court focused on the "non-union" status of the employee

at the time the alleged pre-hire promises were made, as did the Third Circuit below.

The Ninth and Fifth Circuit Courts of Appeals, however, have reached a conclusion opposite to the court's ruling below, finding that union status is immaterial when the job covered by a purported pre-hire agreement is governed by a collective bargaining agreement, and that claims such as respondent's are preempted by Section 301. *See Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993 (9th Cir. 1987); *Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d 359 (5th Cir.), *cert. denied*, 469 U.S. 1018 (1984).

In *Young*, the plaintiff, like respondent, brought state law contract and tort claims for an alleged breach of a pre-hire individual employment agreement. The plaintiff alleged she was promised her employment would be terminable only for just cause, a term inconsistent with the terms of the collective bargaining agreement which governed the post for which she was hired: the labor agreement provided that for the first thirty days employees were terminable at will. 830 F.2d. at 996. Defendant employer removed the action, plaintiff's motion for remand was denied and defendant's motion for summary judgment was granted. The Ninth Circuit upheld the trial court's dismissal of the action.

Although the plaintiff in *Young*, like respondent, contended that her pre-hire agreement was independent of the collective bargaining agreement, the Ninth Circuit noted that "[t]he subject matter of her contract, however, is a job position covered by the CBA. Because any 'independent agreement of employment [concerning that job position] could be effective only as part of the collective bargaining agreement,' the CBA controls and the contract claim is preempted." *Id.* at 997 (quoting *Olguin*

v. Inspiration Consolidated Copper Co., 740 F.2d 1468, 1474 (9th Cir. 1984) and citing *Stallcop v. Kaiser Foundation Hospitals*, 820 F.2d 1044, 1048 (9th Cir.), *cert. denied*, 484 U.S. 986 (1987) and *Bale v. General Telephone Co.*, 795 F.2d 775, 779-80 (9th Cir. 1986)).

The Ninth Circuit specifically noted that the situation there (and here) presented was in contrast to the facts in *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987), wherein a breach of contract claim *"concerning a job not governed by a collective agreement"* could be effective independent of the labor agreement and thus, not completely preempted. 830 F.2d. at 998 (emphasis added). Accordingly, the Ninth Circuit determined that Young's claim for breach of contract was an "artfully pleaded" claim for breach of the collective bargaining agreement, was properly removed, and cognizable, if at all, under Section 301.

The Ninth Circuit also determined that Young's state law tort claims for fraud and negligent misrepresentation were preempted by Section 301, whether or not they were also independently removable. Relying on *Lueck*, the court assessed whether the state " 'confers non-negotiable state-law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract.' " *Id.* at 999 (quoting *Lueck*, 471 U.S. at 213). The Ninth Circuit determined that to resolve fraud claims, resort to the collective bargaining agreement would be required, in order to determine if Young justifiably relied on oral representations significantly different than those set forth in the labor agreement. *Id.* at 1001. Accordingly, Young's claims for misrepresentation as well as her contract claim were preempted by federal labor law. *Id. Accord, Eitmann v. New Orleans Public Service, Inc.*, 730 F.2d at 362-63

(union employee's state law claim for breach of pre-hire individual promise of "lifetime employment" was attempt to "limit or condition" terms in collective bargaining agreement contrary to rule of *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944), and preempted by Section 301).

The conflict among the circuit courts of appeals is self-admitted; the courts have made no attempt to distinguish the facts of their respective cases in order to attenuate the obviously divergent outcomes. In *Young*, the Ninth Circuit acknowledged and refused to follow the contrary position of the Eighth Circuit in *Anderson*. 830 F.2d 997 n.1. In turn, the *Anderson* court acknowledged the Ninth Circuit's decision in *Bale* (that an alleged breach of pre-hire individual agreements which concern a job covered by the collective bargaining agreement is preempted by Section 301), and simply rejected it. 803 F.2d at 959. And the Third Circuit in the instant case began the first line of its opinion with its observation that the issue was "circuit-splitting." (A-2.) The court below discussed at some length the divergent paths followed by the various circuits, and concluded that "[o]n similar facts they reach different answers." (A-13.)

Thus, the circuit courts have consciously reached directly conflicting answers to the question of whether Section 301 preempts state law claims based on individual pre-hire agreements concerning jobs covered by a collective bargaining agreement. The Court should take this opportunity to resolve the conflict by granting certiorari.

C. The Decision Below Conflicts With Decisions Of This Court.

Section 301 confers original jurisdiction upon the federal district courts over "[s]uits for violation of contracts between an employer and a labor organization represent-

ing employees in an industry affecting commerce . . . ." The statute reflects both a grant of jurisdiction and a mandate for the development and application of federal substantive law in disputes over collective bargaining agreements. *Lincoln Mills,* 353 U.S. at 456.

In *Lueck,* this Court held that "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim (citation omitted), or dismissed as preempted by federal labor-contract law." 471 U.S. at 220. *See also Lingle v. Norge Division of Magic Chef, Inc.,* 108 S. Ct. 1877 (1988).

Respondent's state law contract and tort claims, if not outright Section 301 actions to enforce the terms of the collective bargaining agreement, indeed require analysis of the collective bargaining agreement in order to resolve them.[2] The Third Circuit's failure to find that the collective bargaining agreement was implicated by the state law claims stems, in part, from its refusal to consider that the

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[2]The allegations in respondent's complaint do, in fact, set forth an "artfully pleaded" Section 301 claim, which would independently support removal. Although details of this argument must await a brief on the merits, it is well established that the preemptive scope of Section 301 is "so extraordinary" that it " 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.' " *Caterpillar,* 482 U.S. at 393 (quoting *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 65 (1987)). Respondent's claims, if cognizable at all, are Section 301 claims for breach of the collective bargaining agreement: an individual pre-hire promise concerning a position covered by a collective bargaining is effective only as part of the collective bargaining agreement. *See, Young,* 830 F.2d at 997. Whether Section 1.01 (set forth at A-27) of the labor contract at issue here permits modification by individual agreement is wholly a matter relegated, by agreement, to arbitration.

collective bargaining agreement, and, concomitantly, Section 301 preemption, would be implicated in defense of the state law claims, if not in the prima facie case. The court below failed to follow this Court's determination in *Lingle* that all elements of the state law claim, *including defenses,* are examined in a Section 301 preemption analysis, where, as here, removal jurisdiction is not at issue. The Third Circuit simply confused principles of removal jurisdiction pursuant to Section 301 with substantive preemption analysis.[3]

In *Lingle* (a case virtually ignored by the court below), this Court analyzed all elements of a plaintiff's claim of retaliatory discharge for filing a workers' compensation charge to determine if the state law claim was preempted. As in this case, removal was not at issue in *Lingle.* The

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[3]The Third Circuit failed to recognize that the *Caterpillar* decision on which it primarily relied was directed to issues of removal jurisdiction. The court below recognized that the propriety of removal in this case was not at issue: the case was removed on both federal question and diversity bases. (A-5.) Yet the court persisted in analyzing the case in accordance with the "well-pleaded complaint rule" set out in *Caterpillar.*

Although the "test" for Section 301 removal jurisdiction and substantive preemption follow the same principles (*see Lingle,* 108 S. Ct. 1881 n. 5), the analysis diverges on at least one crucial point overlooked by the court below. The Third Circuit interpreted *Caterpillar* to "hold" that the "possibility that a federal claim may be raised in the defense of a contract suit does not mean that the state contract claim is preempted under section 301." (A-15, n. 6.) The Third Circuit misread *Caterpillar.* Although this Court in *Caterpillar* disapproved of federal defenses — including Section 301 — as a basis of "complete" preemption (i.e. removal jurisdiction based on recharacterization of a claim as a Section 301 claim), it has *not* held that, ultimately, preemption cannot rest on a defense requiring interpretation of the collective bargaining agreement. The analysis in *Lingle* mandates just the opposite conclusion.

Court outlined the *Lingle* plaintiff's prima facie case, finding that none of the elements required a court to interpret any term of a collective bargaining agreement. The Court did not stop its analysis there.

> "*To defend against a retaliatory discharge claim,* an employer must show that it had a non retaliatory reason for the discharge, [citations omitted]; this purely factual inquiry likewise does not turn on the meaning of any provision of a collective bargaining agreement." 108 S. Ct. at 1882 (emphasis added).

Thus, in *Lingle,* although this Court found the claim for retaliatory discharge not preempted by Section 301, it did not reach that conclusion before an examination of both the prima facie case *and* defenses. The court below refused to even consider defenses, preoccupied with *Caterpillar's* mandate that removal jurisdiction be governed by the well-pleaded complaint rule. That rule has no application in a motion for summary judgment or judgment on the pleadings in a case properly removed. *Accord, Vacca v. Viacom,* 875 F.2d 1337, 1342 (8th Cir. 1989) ("The complete factual background of the case must be examined against all elements of the state law claim, *including defenses,* to determine whether the terms of the union contract 'come into play.' " (Emphasis added.)

Had the court below properly relied on and applied the tests set forth in *Leuck* and *Lingle* and examined *all* elements of respondent's state law claims, there would be no question that in this case the collective bargaining agreement is invoked by an essential element of each claim.

Under general state law principles of contract interpretation and proof in Pennsylvania, oral representations or implied agreements may not be considered by the courts

nor relied on by plaintiffs in the face of written agreements to the contrary. *Gagnon v. Speback,* 118 A.2d 744 (Pa. 1955). For example, in Pennsylvania an exception to the presumption that employment is at will results where the parties' conduct has resulted in an express or implied-in-fact agreement requiring just cause for termination. *Martin v. Capital Cities Media, Inc.* 511 A.2d 830 (Pa. Super. 1986) *Darlington v. General Electric, Inc.,* 504 A.2d 306 (Pa. Super. 1986). But a plaintiff may not circumvent express at will language in a written employment agreement by alleging representations or implied contractual terms to the contrary, and reliance on such contrary representations is unreasonable as a matter of law. *See Baker v. Lafayette College,* 504 A.2d 247, 254-55 (Pa. Super. 1986), *aff'd* 532 A.2d 399 (Pa. 1987); *Martin,* 511 A.2d at 838.

In accord with these state law contract principles, respondent has alleged several factors to support the allegation of an individual contract for continued employment, including oral reassurances of continued employment and financial security, and policies and practices of CBS which allegedly suggest CBS would only discharge respondent for cause and would protect him from layoff. (A-3.) Respondent mentions the collective bargaining agreement only in passing, alleging that his oral or implied individual contract was "supplemental" to the written labor contract.

Like the plaintiffs in *Baker* and *Martin,* respondent cannot ignore his written employment contract, i.e., the collective agreement between respondent and CBS, which defined the terms of respondent's employment relationship with respect to discharge, layoffs and job security. (§§ 2.05, 5.02-5.03) (A 29-31.) More importantly, Section 1.01 of the labor contract states that "[a]ny changes,

supplements or amendments made during the term of this Agreement must be reduced to writing, numbered serially, signed by the parties hereto . . . and then shall become a part of this Agreement." (A-27.) (Emphasis added.) Respondent cannot pick and choose among the circumstances of his employment relationship, simply because he wants to escape these terms of the collective bargaining agreement. A fundamental element in both respondent's prima facie case and CBS's defense of breach of contract will be an analysis of the collective bargaining agreement, in particular, Sections 1.01, 2.05, 5.02 and 5.03 and their preemptive effect on the purported individual promises. Because interpretation of the collective bargaining agreement is the exclusive province of the arbitrator, federal law should determine if respondent may assert a claim based on alleged independent oral promises concerning terms and conditions of employment which are subject to mandatory collective bargaining and which have been collectively bargained.

Similarly, in order to establish claims for misrepresentation, a plaintiff must demonstrate justifiable reliance. *Scaife Co. v. Rockwell-Standard Corp.*, 285 A.2d 451, 454 (Pa. 1971), *cert. denied*, 407 U.S. 920 (1972). Here, respondent is faced with oral or implied terms wholly contradictory to those in his "written" collective bargaining agreement. In *Martin*, the Pennsylvania court concluded that because

> "[a]ppellant had been hired as an at-will employee. . . . [w]e do not believe a reasonable person in the appellant's position would have read this handbook provision as converting her from an at-will employee to an employee with an indefinite contract who could never be discharged without objective just cause. We reiterate that there was already a contract

> between the appellant and the newspaper, the terms of which were that appellant could be discharged for any or no reason." 511 A.2d at 838.

In the instant case, the terms of the "written agreement," i.e., the collective bargaining agreement, must be analyzed under respondent's state law claim to determine if respondent's reliance on the purported individual representations was justifiable. Any analysis of the labor contract, of course, must be left to the arbitrator. More to the point, this Court has held that if resolution of the state law claim requires interpretation of the collective bargaining agreement, the state law claim is preempted by Section 301. *Lueck*, 471 U.S. at 220.

The court's error below was in relying almost exclusively on this court's decision in *Caterpillar*. In doing so, the court failed to account not only for the marked distinctions in the procedural posture of the two cases, but it also ignored marked factual distinctions. The *nature* of the promises allegedly made in *Caterpillar* had only peripheral connection to the collective bargaining agreement: plaintiffs in that case claimed they were told, as management employees, that they had " 'indefinite and lasting employment with the corporation.' " 482 U.S. at 388. And when they were downgraded to union positions they were told that the union assignments were only temporary. *Id.* at 389. The representations purportedly made to the *Caterpillar* plaintiffs did not implicate the terms of the collective bargaining agreement, because the breach there was in not affording plaintiffs their promised job security in management positions, not a breach of a term of employment specifically governed by the collective bargaining agreement. *Id.* at 395 n.9.

Here, by contrast, the purported representations concern the very terms and conditions of a *union* position, a

position governed by the collective bargaining agreement in place at the time the alleged representations were made. The Third Circuit failed to recognize a fundamental difference between a promise that placement in a union position itself will be temporary (*Caterpillar*), and a promise that a prospective union employee will enjoy job security and layoff protections other than those set forth in the pertinent collective bargaining agreement.

Finally, the Third Circuit's failure to distinguish *Caterpillar* stems largely from its short-sighted focus on the *timing* of the alleged pre-hire agreement, a focus shared by the Eighth and Eleventh Circuits.[4] (A-14.) However, based on this Court's authority, using union or non-union status as the fulcrum of a Section 301 preemption analysis is inappropriate. *See, e.g. Republic Steel,* 379 U.S. at 657 (former employee's severance pay claim preempted by Section 301). *See also J. I. Case Co. v. NLRB,* 321 U.S. 332 (1944) (individual contracts made prior to union representation deemed subsumed by collective bargaining agreement). This Court should grant the Petition for Writ of Certiorari not only to resolve conflict among the circuits but also to clarify misconceptions of its prior rulings evidenced in the decision below.

II

THE DECISION BELOW PRESENTS IMPORTANT ISSUES OF FEDERAL LAW.

The Third Circuit has not only issued a "circuit splitting" decision, but the rule espoused by the court below also seriously erodes fundamental precepts of federal labor policy. Employers and unions face the prospect that

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[4]See *Anderson,* 803 F.2d at 958; *Varnum,* 804 F.2d at 640.

protracted state court litigation over federal questions will become commonplace as a result of the decision below. It is a matter of some record that suits based on state common law for or related to "wrongful termination" are on the rise, and an entire new body of state law has developed which, in many jurisdictions, has eroded the traditional employment at will doctrine. *See* Lopatka, *The Emerging Law of Wrongful Discharge — A Quadrennial Assessment of the Labor Law Issue of the 80s*, 40 Bus. Law 1 (1984); Stieber, *Recent Developments in Employment at Will*, 36 Lab. L.J. 557 (1985).

Individual union employees, such as respondents, have not hesitated in their efforts to take advantage of these developments. In an attempt to divorce themselves from their collective bargaining agreement and the grievance and arbitration remedies provided therein, union employees have asserted causes of action for breach of purported "individual" employment agreements and related tort actions. Several federal courts have been forthright in rejecting a union employee's argument that his allegations of "individual" employment contracts provide him rights independent of the collective bargaining agreement. If the decision below stands, however, it is inevitable that numerous union employees, unhappy with their collectively bargained agreement, will seek to avoid the terms of their labor contract and the grievance and arbitration remedies negotiated therein by suing in state courts on the basis of "pre-existing" employment agreements.[5]

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[5]A recent search of published decisions of federal and state courts has revealed that since this Court's decision in *Lingle*, in 1988, no fewer than forty cases have been reported in which union employees have sought, with varying degrees of success, to avoid the terms of their collective bargaining agreements and litigate employment dis-

The threat of lengthy litigation, while troublesome, is perhaps not the most damaging effect of the Third Circuit's decision. The loss of the federal arbitration forum and substitution of state law gives rise to the possibility that individual contract terms might have different meanings under state and federal law, which would "inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Teamsters Local v. Lucas Flour*, 369 U.S. 95, 103 (1962).

In *Lueck*, this Court recognized that a primary purpose of Section 301 preemption by the LMRA is to promote national uniformity in labor relations by preventing the various state courts from applying their own common law principles in the interpretation of collective bargaining agreements. 471 U.S. at 211-213. The opinion below undermines this paramount policy of federal labor law, because it allows precisely the kind of state law intervention eschewed by this Court in *Lueck*.

The decision below, and its inevitable effect of diminishing the role of the arbitrator in labor relations, presents squarely the specter of industrial strife envisioned in *Republic Steel*. In that case, a discharged union employee brought a state law breach of contract claim for severance pay pursuant to the terms of the collective bargaining agreement. Rejecting the state court view that federal labor law was inapplicable because, with the end of the employment relationship the threat of industrial strife had ended, this Court found the contract claim was, indeed, controlled by Section 301, and that the potential for strife survived despite the "non-union" status of the former employee. 379 U.S. at 657.

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putes via state law claims. There is a strong likelihood, of course, that the number of unreported decisions is legion.

> "Severance pay and other contract terms governing discharge are of obvious concern to all employees, and a potential cause of dispute so long as any employee maintains a continuing employment relationship. Only in the situation in which no employees represented by the union remain employed, as would be the case with a final and permanent plant shutdown, is there no possibility of a work stoppage resulting from a severance-pay claim. But even in that narrow situation, if applicable law did not require resort to contract procedures, the inability of the union and employer at the contract negotiation stage to agree upon arbitration as the exclusive method of handling permanent shutdown severance claims in all situations could have an inhibiting effect on reaching an agreement." *Id.* at 656.

The Eighth Circuit's decision in *Anderson* clearly illustrates the threat to collective bargaining which is posed by the position of the Third, Eighth and Eleventh Circuits. Initially, the plaintiffs in that case did not bring a claim against the United Auto Workers International Union, the union which represented plaintiffs' bargaining unit. Later, however, the union was joined as a necessary party in order to protect non-plaintiff union employees, whose seniority rights were threatened by the plaintiffs' claim to "lifetime" employment based on statements of company representatives. 803 F.2d at 955 n.2. State law claims of this nature seriously interfere with the ability of labor and management to enter into binding agreements with respect to terms and conditions of employment.

And the Third Circuit's willingness to substitute state tort and contract law actions for grievance and arbitration remedies is contrary to congressional mandate. Not

only does the Third Circuit's rule foster abandonment of grievance and arbitration provisions by employees, the rule will also discourage employers, particularly small employers, from adopting such provisions in the first instance. Employers will likely refuse to agree to contract terms which enhance the prospect of litigating employment disputes in two forums. The Court in *Republic Steel* stated:

> "Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant. [citations omitted.] Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. Conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. . . .
>
> A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of

collective agreements.' *Teamster Local v. Lucas Flour Co.*, 369 U.S. 95, 103." 379 U.S. at 653.

This Court has previously recognized, then, that the questions presented by the decision below are substantial. It is essential that this Court reaffirm that the collective bargaining agreement is the sole source of a union employee's remedy for violations of negotiable terms and conditions of employment, that employees cannot rely on individual pre-hire agreements that concern the terms of a union position covered by a collective bargaining agreement, and that federal law is the sole regulator of the collective bargaining relationship.

CONCLUSION

For the foregoing reasons, the Association respectfully submits that this case presents a substantial federal question for this Court's review, that the decision below conflicts with this Court's and other circuit courts' authority and that, accordingly, this Court should grant the petition for writ of certiorari.

DATED: November 13, 1989.

Respectfully submitted,

CHARLES G. BAKALY, JR.
(Counsel of Record)
DEBRA L. BOYD
MICHAEL A. CURLEY
O'MELVENY & MYERS
Citicorp Center
153 East 53rd Street
New York, New York 10022-4611
(212) 326-2000
Attorneys for Amicus Curiae, Merchants and Manufacturers Association

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On November 13, 1989, I served the within Motion for Leave to File Brief and Brief of Amicus Curiae in re: "CBS Inc. vs. Martin W. Berda and Linda Berda" in the United States Supreme Court, October Term 1989, No. 89-589, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Douglas P. Jacobs
Helen M. Gold
Anthony M. Bongiorno
CBS INC.
51 West 52nd Street
New York, New York 10019

Arthur J. Schwab
Mark A. Fontana
Reed Smith Shaw & McClay
435 Sixth Avenue
Pittsburgh, PA 15219

John D. Hendricks
Joseph J. Hinchliffe
Tarasi & Johnson, P.C.
510 Third Avenue
Pittsburgh, PA 15219

All parties required to be served have been served.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on November 13, 1989, at Los Angeles, California.

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No. 89-589

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CBS INC.,

Petitioner,

v.

MARTIN W. BERDA and LINDA BERDA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF GENERAL MOTORS CORPORATION IN SUPPORT OF THE PETITIONER

DAVID M. DAVIS
MARK R. FLORA
General Motors Corporation
Office of General Counsel
3031 West Grand Boulevard
Detroit, Michigan 48202
(313) 556-5000

JAMES D. HOLZHAUER
Counsel of Record
STEPHEN M. SHAPIRO
KENNETH S. GELLER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF GENERAL MOTORS CORPORATION IN SUPPORT OF THE PETITIONER

Pursuant to Rule 36.2 of the Rules of this Court, General Motors Corporation ("GM") respectfully moves for leave to file the attached brief *amicus curiae* in support of the petitioner. Counsel for petitioner has consented to the filing of this brief but counsel for respondents has withheld consent.

GM's interest in this case arises from the fact that it has recently sought this Court's review in *Wells* v. *General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989), petition for cert. filed, No. 89-____ (Dec. 27, 1989). In *Wells*, the court of appeals held, *inter alia*, that Section 301 of the Labor

Management Relations Act did not pre-empt a state law fraud and misrepresentation action related to "an extraneous promise" allegedly made to employees who were covered by a collective bargaining agreement. The alleged "promise" concerned the eligibility of the employees for future employment if they elected to leave their job pursuant to a negotiated Voluntary Termination of Employment Plan.

The petitioner in this case raises a closely related question: whether Section 301 pre-empts state law claims related to alleged pre-employment promises made to an individual who subsequently becomes a member of a bargaining unit covered by a collective bargaining agreement. Although resolution of that question would not necessarily resolve the Section 301 issue in *Wells*, it may have an impact on the *Wells* issue. GM seeks leave to file this brief to demonstrate how this case relates to the Fifth Circuit's *Wells* decision and other decisions involving promises made to employees who were covered by collective bargaining agreements at the time the promises allegedly were made.

Respectfully submitted,

DAVID M. DAVIS
MARK R. FLORA
General Motors Corporation
Office of General Counsel
3031 West Grand Boulevard
Detroit, Michigan 48202
(313) 556-5000

JAMES D. HOLZHAUER
Counsel of Record
STEPHEN M. SHAPIRO
KENNETH S. GELLER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Attorneys for Amicus Curiae General Motors Corporation

December 1989

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF AMICUS CURIAE OF GENERAL MOTORS CORPORATION IN SUPPORT OF THE PETITIONER

General Motors Corporation ("GM") respectfully submits this brief as amicus curiae in support of the petition for a writ of certiorari.

INTEREST OF THE AMICUS CURIAE

As stated in the motion for leave to file this brief, GM's interest in this case arises from the fact that it has recently sought this Court's review in *Wells* v. *General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989), petition for cert. filed, No. 89-____ (Dec. 27, 1989). In *Wells*, the court of appeals

held, *inter alia*, that Section 301 did not pre-empt a state law fraud and misrepresentation action related to "an extraneous promise" allegedly made to employees who were covered by a collective bargaining agreement. The alleged "promise" concerned the eligibility of the employees for future employment if they elected to leave their job pursuant to a negotiated Voluntary Termination of Employment Plan.

The petitioner in this case raises a closely related question: whether Section 301 pre-empts state law claims related to alleged pre-employment promises made to an individual who subsequently becomes a member of a bargaining unit covered by a collective bargaining agreement. Although resolution of that question would not necessarily resolve the Section 301 issue in *Wells*, it may have an impact on the *Wells* issue. GM seeks leave to file this brief to demonstrate how this case relates to the Fifth Circuit's *Wells* decision and other decisions involving promises made to employees who were covered by collective bargaining agreements at the time the promises allegedly were made.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, creates federal jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization * * *." For the past 30 years, this Court has consistently held that disputes between employers and employees relating to the terms and conditions of employment set forth in collective bargaining agreements must be governed by a uniform body of federal law. This case represents one of several recent attempts by employees

to circumvent that scheme of uniform federal law by alleging that their employers entered into (and breached) individual employment contracts separate and apart from the collective agreements that otherwise governed their employment. Such attempts generally have taken either the form seen in this case, where the employee alleges a pre-employment promise, or the form seen in *Wells* v. *General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989), petition for cert. pending, No. 89-____, where the employees claimed that extra-contractual promises were made to them while they were employees covered by the union contract.

Several courts of appeals have held that state law actions relating to individual contracts brought by employees covered by collective bargaining agreements are pre-empted by Section 301. Other courts of appeals have reached the contrary conclusion. Review by this Court is necessary to resolve the conflict and to protect the realm of federal law and the primary role of arbitration in resolving disputes over labor contracts.

ARGUMENT

The courts of appeals are hopelessly divided on the issue of whether Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, pre-empts state tort and contract claims based on alleged extra-contractual promises relating to the terms and conditions of employment of workers represented by unions. The Fifth and Eighth Circuits agree with the Third Circuit in this case that such claims are not pre-empted. The Ninth and Eleventh Circuits have reached the opposite conclusion. Review by this Court is necessary to resolve the conflict on this important and frequently recurring issue of federal law.

In this case, respondent Martin Berda, a former CBS employee, alleged that the company told him before he was hired that "he would be guaranteed employment with CBS for the reasonably foreseeable future." Pet. App. A-3. When he was laid off, Berda filed suit in state court, claiming that CBS had breached an oral contract and that it had committed fraud and negligent misrepresentation under state tort law. The Third Circuit, which characterized the case as involving a "circuit-splitting question" (*id.* at A-2), held that Berda's tort claims were not pre-empted by Section 301 because "Berda was not required to refer to the collective bargaining agreement in order to state his tort claim." *Id.* at A-17. In the court's view, the fact "that there was a provision of the collective bargaining agreement that also related to layoffs [is a fact] of no consequence, because Berda need not refer to the provision in the collective bargaining agreement in order to make out his claim." *Ibid.*

The Eighth Circuit reached the same conclusion in *Anderson* v. *Ford Motor Company*, 803 F.2d 953 (1986), cert. denied, 483 U.S. 1011 (1987), another case involving an alleged pre-employment promise. The plaintiffs were former Ford employees who claimed that when they were hired they were assured that they would not be bumped by laid-off employees from other plants around the country. When they were bumped, they sued, claiming that Ford's representations to them had been fraudulent and negligent. The court of appeals held that the tort claims were not pre-empted because "[u]nlike the tort claim for bad faith handling of an insurance claim considered in [*Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985)] a claim of fraud does not derive from nor depend upon an underlying contract. Under Minnesota law, proof of fraud does not depend on the existence of any contractual rela-

tionship, nor do the standards for judging fraudulent misconduct derive from any contractually-established expectations of the parties." 803 F.2d at 957. The court acknowledged that the Ninth Circuit had reached the opposite conclusion on similar facts,[1] but held that "we do not agree with [the Ninth Circuit] that adjudication of these state law claims requires any significant reference to the terms of the collective bargaining agreement." *Id.* at 959.

The case directly of interest to GM involves not pre-employment promises, but rather promises that allegedly were made to individuals while they were employees covered by a collective bargaining agreement. In *Wells* v. *General Motors Corp.*, 881 F.2d 166 (5th Cir. 1989), the plaintiffs had left their employment at GM during a widespread reduction-in-force pursuant to a Voluntary Termination of Employment ("VTEP") agreement negotiated between the company and the union. The VTEP provided each of the employees with between $10,000 and $22,000 in special severance benefits. A few years later, when GM began hiring new workers at the employees' former plant, they found that they were ineligible for employment because they had accepted the VTEP benefits. They filed suit, claiming that GM had fraudulently or negligently assured them that they would be eligible for reemployment in the future.

The Fifth Circuit held that the employees' claims were not pre-empted by § 301 because they were not " '*substantially* dependent upon analysis of the terms' of the collective bargaining agreement" and because, in the court's view, the employees were not claiming that GM fraudulently misrepresented the terms of the VTEP, but that

[1] *Bale* v. *General Telephone Co.*, 795 F.2d 775 (9th Cir. 1986).

it "fraudulently *induced* individual employees to opt for the VTEP by making an extraneous promise concerning their future employment eligibility." The court acknowledged that plaintiffs' claims would nevertheless be pre-empted if the agreement governed the disputed issue, but held that "[a]fter careful review of the VTEP, we find no provision that reasonably might be construed to govern the issue of future employment eligibility, nor are there 'vague and ambiguous' references to eligibility that might be construed in GM's favor." 881 F.2d at 174.

The Ninth Circuit, on the other hand, has held that claims relating to pre-employment promises are pre-empted by Section 301. For example, in *Young* v. *Anthony's Fish Grottos, Inc.*, 830 F.2d 993 (1987), an employee (Young) claimed that when she was hired by her employer in 1985 she was assured that she could be discharged only for just cause even though under the collective bargaining agreement between the union and her employer she would be classified as a probationary employee subject to discharge at the company's discretion. When Young was fired without apparent cause, she sued, claiming fraud and misrepresentation. The Ninth Circuit held that her claims were pre-empted by Section 301. "Because any 'independent agreement of employment could be effective only as part of the collective bargaining agreement,' the CBA controls and the contract claim is preempted." 830 F.2d at 997. The court acknowledged that its decision conflicted with the Eighth Circuit's *Anderson* decision, but held that it was bound by its previous decision in *Bale* v. *General Telephone Co., supra.* See also *Chmiel* v. *Beverly Wilshire Hotel Co.*, 873 F.2d 1283, 1285-1286 (9th Cir. 1989); *DeLapp* v. *Continental Can Co.*, 868 F.2d 1073, 1074-1076 (9th Cir. 1989) (involving a promise allegedly made to an individual who was a member of the bargaining unit at the time).

The Eleventh Circuit's approach to the issue of extra-contractual promises focuses on whether the alleged promise was made when the employee was a member of the bargaining unit. If the state law suit alleges a pre-employment promise (as in this case), the action is *not* pre-empted by Section 301. *Varnum* v. *Nu-Car Carriers, Inc.*, 804 F.2d 638, 640 (11th Cir. 1986), cert. denied, 481 U.S. 1049 (1987). But if the promise was made to individuals who were bargaining unit employees at the time (as in *Wells*), the state law claims are pre-empted. *Darden* v. *United States Steel Corp.*, 830 F.2d 1116, 1119-1120 (11th Cir. 1987); *Mason* v. *Continental Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985), cert. denied, 474 U.S. 1087 (1986); *Redmond* v. *Dresser Indus.*, 734 F.2d 633 (11th Cir. 1984). The Eleventh Circuit would thus agree with the Eighth Circuit's decision in *Anderson* and the Third Circuit's decision in this case (and would thus disagree with the Ninth Circuit in *Young* and *Bale*), but it would disagree with the Fifth Circuit in *Wells* because the plaintiffs in that case "were clearly employees within the meaning of the collective bargaining agreement when the alleged misrepresentations, which constitute the crux of their complaints, were made to them." *Darden*, 830 F.2d at 1119.

It is essential that this Court resolve the conflict among the circuits on an important and frequently recurring question of federal law. Disagreements between employers and employees are commonplace, and it would be the rare employee who could not package his complaint as an "independent" state law cause of action by alleging "extraneous promises" relating to—if not directly governed by—the terms of a collective bargaining agreement. As a result, state law claims such as these will continue to proliferate until this Court clarifies the governing principles. Nothing

could be more destructive of the goals Congress sought to achieve in enacting Section 301 than a rule facilitating attempts by individual employees to make end runs around the terms of collectively bargained agreements and around contractual dispute resolution mechanisms.

Accordingly, GM respectfully urges this Court to clarify the pre-emptive scope of Section 301 by granting either the petition in this case or the petition in *Wells*. In this regard, there are three respects in which *Wells* may be the more appropriate vehicle for this Court's review.

First, *Wells* involves extra-contractual promises allegedly made to employees *covered by a collective bargaining agreement*, while this case involves pre-employment promises. Whatever the status of state law claims in the latter context, in light of *Caterpillar Inc.* v. *Williams*, 482 U.S. 386 (1987),[2] the lower courts are in stark disagreement about the legitimacy of state law suits alleging that separate promises were made to members of the bargaining unit subject to the labor contract. Compare *Wells* with *Darden* and *DeLapp*.

Second, *Wells* involves a claim that the employer essentially misrepresented the terms of an agreement being negotiated with the union representing its employees, while this case involves an allegation that the employer

[2] In *Caterpillar*, this Court held that state law claims for breach of individual employment contracts were not "completely pre-empted" by Section 301 and thus were not removable to federal court. As in this case, the individual contracts were allegedly made before the employees became members of the bargaining unit and thus before they were covered by any collective bargaining agreement. In *Wells*, by contrast (as well as in the Eleventh Circuit's decision in *Darden* and the Ninth Circuit's decision in *DeLapp*) the alleged promises were made while the plaintiffs *were* members of the bargaining unit subject to the labor contract.

made promises regarding the employee's job security that were separate from and not dependent upon the terms of the collective bargaining agreement. Whatever the legality of the latter promises under Section 301, it is crystal clear that the state law claim in *Wells* "is extricably intertwined with consideration of the terms of the labor contract" (*Lueck*, 471 U.S. at 213).

Third, *Wells* presents two additional important issues of federal law that have divided the courts of appeals: whether state law claims that allege conduct "arguably prohibited" by Section 8 of the National Labor Relations Act, 29 U.S.C. § 158, continue to be pre-empted after this Court's decision in *International Longshoremen's Ass'n* v. *Davis*, 476 U.S. 380 (1986);[3] and whether Section 514(a) of the Employee Retirement Income Security Act, 29 U.S.C. § 1144(a), pre-empts state law claims relating to severance benefit programs initiated to deal with a single set of job terminations. Granting the petition in *Wells* would permit the Court to resolve all three issues in one case.

Whichever petition the Court grants, the Section 301 preemption issues presented by this case and *Wells* are of vital importance to employers, employees and unions throughout the country. The conflict among the circuits should not be permitted to remain unresolved.

[3] The Third Circuit declined to resolve the NLRA pre-emption issue in this case on the ground that the contention had not been passed upon by the district court. Pet. App. A-20.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending review of *General Motors Corp.* v. *Wells*, No. 89-____.

Respectfully submitted.

DAVID M. DAVIS
MARK R. FLORA
General Motors Corporation
Office of General Counsel
3031 West Grand Boulevard
Detroit, Michigan 48202
(313) 556-5000

JAMES D. HOLZHAUER
Counsel of Record
STEPHEN M. SHAPIRO
KENNETH S. GELLER
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

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